POPULAR GOVERNMENT

Fall 1998 • Vol. 64, No. 1

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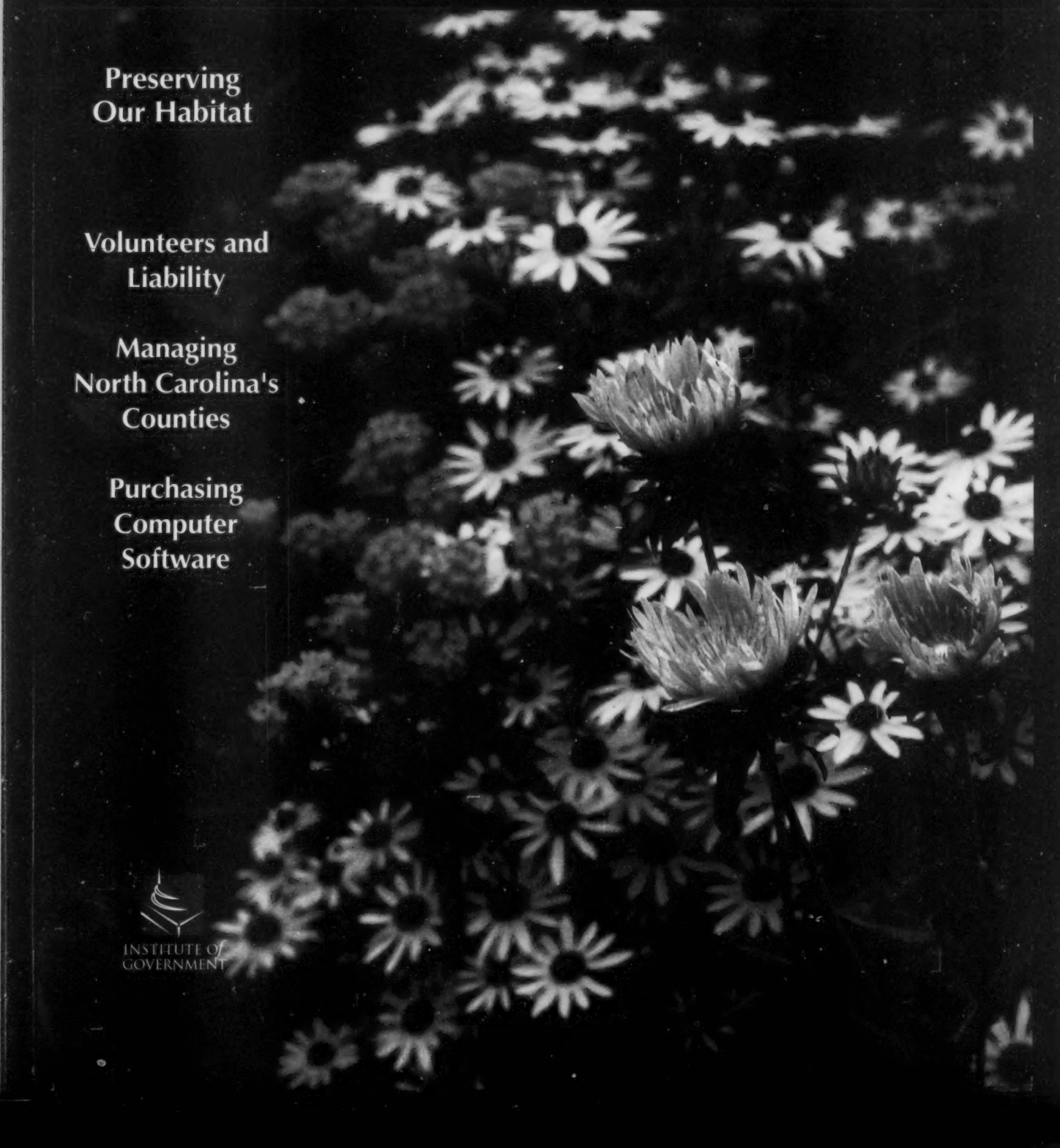

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Popular Government (ISSN 0032-4515) is published four times a year (summer, fall, winter, spring) by the Institute of Government, CB# 3330 Knapp Building, UNC–CH, Chapel Hill, NC 27599-3330. Subscription: $20.00 per year. Second-class postage paid at Chapel Hill, NC, and additional mailing offices. POSTMASTER: Please send change of address to Institute of Government, CB# 3330 Knapp Building, UNC–CH, Chapel Hill, NC 27599-3330. ♾ This publication is printed on permanent, acid-free paper in compliance with the North Carolina General Statutes. ♻ Printed on recycled paper with soy-based ink. Printed in the United States of America.

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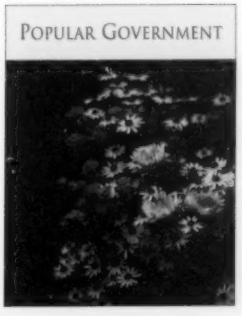

On the cover The North Carolina Botanical Garden encourages conservation through propagation by promoting highway plantings and home cultivation of native wildflowers grown from seeds or cuttings. Photo by Rob Gardner.


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New Legal Protection for Volunteers

Ingrid M. Johansen

Last year federal legislation called the Volunteer Protection Act of 1997 (VPA)[1] dramatically changed the potential liability of many volunteers for harm that they cause during volunteer service. Congress enacted the VPA in response to a perceived crisis in volunteerism—a belief that people were volunteering less often because of fear of lawsuits. According to supporters of the VPA, this fear began growing in the mid-1980s when the number of suits against volunteers and their organizations increased, as did the publicity that the suits received. Testimony before the House of Representatives Judiciary Committee cited the following examples:

- A woman who was hit by a ball that her own daughter failed to catch sued the sponsoring Little League organization. The Little League settled the case for $10,000.[2]
- A volunteer with "mountain rescue" in California helped paramedics rescue a man who had fallen from a boulder and injured his spine. The volunteer then coordinated a helicopter lift to the hospital. The fallen man's injuries rendered him a quadriplegic, and he sued the rescuers for $12 million.[3]
- A fly ball injured a young Little League player whom his coaches had placed in the outfield. The claimants sued the Little League organization, apparently alleging that the coaches knew the boy was a born infielder. The Little League settled this case for $25,000.[4]

The author is a research fellow at the Institute of Government.

It is unclear whether the crisis in volunteerism was real or greatly exaggerated. There have been very few suits against volunteers in which reported judicial opinions have been issued, and the settlements and the verdicts that have garnered media attention—outrageous ones like the preceding examples—are about eight to ten years old. Suits that probably are more representative often are subject to confidential settlement agreements, and the insurance industry generally will not release figures on actual awards against the nonprofit organizations that they insure. So, to put it more briefly, no one seems to know which volunteers are really being sued, what they are being sued for, and what kinds of damages they are paying. This lack of hard data prompted critics of the VPA to question whether the number of suits against volunteers and their organizations has actually increased.[5]

Whatever the situation, most people seem to agree that fear of lawsuits, reasonable or not, has negatively affected the willingness of some people to perform volunteer services, as well as the willingness of some organizations to use volunteers to perform certain kinds of services and tasks.[6]

The VPA was enacted to prevent frivolous lawsuits or outrageous damage awards against volunteers for simple mistakes that occur during their volunteer service. This article discusses the VPA's basic provisions and some of the issues the act raises. Specifically the article addresses the following questions:

- How does the VPA protect volunteers?
- What does the VPA do for organizations that use volunteers?

(*Opposite*) Volunteers at work on a Habitat for Humanity construction site in Durham.

- How does the VPA affect the laws of North Carolina relating to volunteer liability?
- How does the VPA affect persons harmed by volunteers?

How Does the VPA Protect Volunteers?

In broad terms the VPA protects volunteers serving governmental entities and nonprofit organizations from liability for harm caused by negligent acts or omissions during their volunteer service.[7]

Which Volunteers Does the VPA Protect?

The VPA defines "volunteer" as someone who does not receive compensation (other than reasonable reimbursement for expenses incurred), or any other thing of value in place of compensation, in excess of $500 per year.[8] Under this definition a director, an officer, a trustee, or a direct-service provider for an organization may be a volunteer. Before the VPA, in states that had laws limiting volunteer liability, those laws most often protected only directors and board members, usually providing no coverage to direct-service volunteers.[9]

The VPA does not protect all volunteers, however. It covers only volunteers serving governmental entities and nonprofit organizations. The statute does not define governmental entities, presumably because they are easily identified. It defines nonprofit organizations primarily by reference to tax-exempt status under the Internal Revenue Code,[10] but it also may cover volunteers of nonprofit organizations that are not tax exempt as long as the organizations operate primarily for the public benefit.[11] A bar association or another trade organization might meet this last criterion.

If the volunteer serves a nonprofit group that practices activities constituting hate crimes, however, he or she will not qualify for the VPA's protection.[12] "Hate crimes" are crimes that show evidence of prejudice based on race, religion, disability, sexual orientation, or ethnicity. For example, if a volunteer for the Ku Klux Klan negligently causes harm to someone while he is driving supplies to a KKK cross-burning, the VPA will not protect him.

Volunteers providing services to individuals, or to organizations that are not governmental entities or nonprofit organizations, qualify for no protection at all under the VPA. However, if a state has a law protecting these non–VPA volunteers, the VPA would not affect it. North Carolina has such a law, General Statute (hereinafter G.S.) 90-21.14, also known as the Good Samaritan statute. It provides that anyone rendering emergency health care to a person who is in danger of serious bodily injury or death will not be held liable for injuries sustained by the person during the emergency assistance, unless the injuries were caused by gross negligence, wanton conduct, or intentional wrongdoing on the part of the person giving assistance.

What Kinds of Volunteer Conduct Are Not Protected?

Even volunteers who qualify for the VPA's protection are not entirely shielded from liability for harm that they cause during volunteer service. The intention of the VPA, as stated by its supporters in Congress, is to protect qualified volunteers from liability when they cause harm as a result of simple negligence.[13] At the most general level, "negligence" is the failure to exercise the degree of care that a reasonable person in like circumstances would exercise—in other words, the failure to exercise due care. For example, a volunteer at a church day-care center falls asleep during the children's nap time for approximately two minutes. While she is asleep, one of the toddlers escapes the church's fenced yard and is bitten by the dog next door. This probably is a case of simple negligence, and the VPA will protect the volunteer from liability if the toddler's parents bring suit against her for negligently failing to supervise their child.

Although protection from liability for harm caused by simple negligence is a significant benefit to volunteers and seems to provide a fairly straightforward standard for volunteers to follow, volunteers should be aware of several conditions on, and exceptions to, this protection.

Simple Negligence in Certain Situations

The VPA does not protect four kinds of simple negligence. First, a volunteer can be held liable for harm that results from simple negligence during an activity that is not within the scope of the volunteer's duties. For example, if a volunteer for a meals-on-wheels program attempts to fix the broken oven of a meal recipient, the volunteer may be held liable for harm caused by negligence in performing the repair. Presumably the volunteer's duties extend to conversing with the meal recipient while she or he is dining and possibly to telephoning an appropriate person

for assistance if the meal recipient needs it, but surely the meals-on-wheels organization does not authorize its volunteers to perform home repair while they are on the job.

Second, and quite important, harm that occurs while a volunteer is operating a motor vehicle, a vessel, an aircraft, or another kind of vehicle for which the state requires a license or insurance also is excluded from the VPA's coverage.

Third, if the volunteer is engaged in an activity for which the state requires a license or a certificate, but the volunteer does not have the license or the certificate, he or she can be held liable for simple negligence.

Finally, if the volunteer causes harm while under the influence of drugs or alcohol, she or he can be held liable even if the harmful conduct amounts only to simple negligence.[14]

Gross Negligence

Next, harm caused by gross negligence is specifically excluded from the VPA's liability protection. A notoriously fuzzy concept, "gross negligence" signifies more than ordinary inattention but less than conscious indifference to consequences.[15] For instance, a local representative of the National Rifle Association volunteers to make a presentation on gun safety at an elementary school. He takes a gun that he believes to be unloaded; he firmly recalls that after he used it the last time, he emptied it. However, one cartridge remains in the gun. During the presentation the gun goes off, shooting a student in the foot. The volunteer had some reason to believe that the gun was not loaded, so he was not consciously indifferent to the danger. But he was going to give a presentation in a room full of students, so his not double-checking the gun may have represented more than ordinary negligence.

As this example shows, it is hard to determine beforehand where the line between simple and gross negligence lies. To some extent this uncertainty may frustrate the VPA's goal of giving volunteers comprehensible standards to guide their behavior. Also, exclusion of gross negligence from the VPA's protection may thwart the goal of reducing the number of lawsuits filed against volunteers. Whether conduct amounts to gross negligence often is not determined until a judge renders judgment or a jury reaches a verdict, and this fact may encourage a person injured by a volunteer to come up with an allegation of gross negligence.[16]

Intentional Torts

Finally, it is unclear whether the VPA restricts liability for harm that a volunteer causes as a result of an intentional tort, such as assault or battery. A "tort" is a negligent or intentional act (or omission) that causes harm, for which the person harmed may bring a civil—as opposed to a criminal—suit. An "intentional tort," as opposed to a negligent tort (simple negligence), is one in which harm results from an intentional act. For example, a volunteer hall monitor in a public school grabs a student to prevent her from running down the hall, and accidentally breaks her arm. This action is the intentional tort called battery. The action that causes the harm—the arm-grabbing—is specifically intended, even if the harm is not. Would the VPA protect the volunteer from liability in this case? The VPA and its legislative history leave the question unanswered.

The VPA's legislative history gives little guidance on this question primarily because the issue of whether intentional torts were protected was never raised. Speakers at congressional hearings and in the *Congressional Record* stressed repeatedly that the VPA would protect only simple negligence, but, by way of explanation, they frequently followed up with the statement that volunteers should not be held liable for harm resulting from honest mistakes or good-faith errors. These statements can be read in (at least) two ways: (1) the standard is a legal one, focusing on whether the harmful conduct comes within the category of simple negligence; or (2) the standard is more commonsensical, focusing on the volunteer's mind-set when he or she acted in the way that caused harm. So, on the one hand, as a matter of strict legal doctrine, intentional torts are not the same as negligent torts: in determining whether an intentional tort has been committed, courts focus not on whether the defendant exercised due care but on whether the intentional act caused harm.[17] On the other hand, as the hall monitor example illustrates, harm caused by intentional torts may result from an honest mistake or a good-faith error, just as in cases of simple negligence.

The text of the VPA is slightly more helpful but still not conclusive. Although the VPA's supporters emphasized that volunteers should not be held liable when they cause harm while performing their services in "good faith," the text of the VPA does not contain that term. This may mean that the term "simple negligence" should be understood in its legal, rather than

moral, sense. And in terms of legal categories, intentional torts seem to fit within the range of conduct that the VPA excludes from its protection. The least-blameworthy (in the sense of having the intention to commit a bad act) conduct that the VPA excludes is *gross negligence*, which requires no specific intent—either to act or to cause harm. The most-blameworthy conduct that the VPA excludes is *willful* or *criminal misconduct*, which requires both intent to act and intent to cause harm. Intentional torts, requiring the intent to act but not the intent to cause harm, seem to fall somewhere between these two kinds of conduct and thus within the range of conduct excluded from the VPA's coverage.

Until a court of binding authority answers the question of whether volunteers can be held liable under the VPA for harm caused by intentional torts, North Carolina volunteers should presume that they can be held liable.

Other Exceptions

Although some clarity is lacking about what kinds of conduct the VPA protects, it flatly excludes from coverage several very clearly stated kinds of conduct. Most obviously, the VPA protects qualified volunteers from liability in certain civil suits, but it does not protect them from prosecution in criminal suits. Also, a volunteer still can be held fully liable for harm caused by an act that (1) constitutes a crime of violence[18] or an act of international terrorism for which the defendant has been convicted in any court;[19] (2) constitutes a hate crime;[20] (3) involves a sexual offense, as defined by applicable state law, for which the defendant has been convicted in any court; or (4) involves misconduct for which the defendant has been found to have violated a federal or state civil rights law.[21] If a volunteer's conduct meets the criteria under (1), (3), or (4), the injured person can sue that volunteer in civil court only if the volunteer already has been found guilty of such conduct in a separate judicial proceeding. Hate crimes may be an exception to the latter statement; the language of the statute seems to suggest that a guilty verdict in a separate proceeding is not necessary for a civil suit to proceed.

What Is the Nature of the VPA's Protection?

The VPA provides that no qualified volunteer shall be liable for harm caused by conduct protected by the VPA. Also, when a volunteer can be held liable, the VPA limits the circumstances in which she or he can be made to pay punitive damages and restricts the amount of noneconomic damages for which she or he can be held responsible. Limitations on damages are discussed in more detail later.

Volunteers should know what the VPA's protection means in real terms. Although it may have the practical effect of discouraging a person injured by a volunteer from filing suit, it does not legally prevent such a person from filing suit. Statements to the effect that the VPA protects volunteers from suit are therefore misleading. A court still must determine whether or not the VPA protects a volunteer from liability.

Another important point, also discussed in more detail later, is that the VPA does not limit a volunteer's liability in a case brought against the volunteer by the organization that he or she serves. This provision may seem like a backdoor way of significantly limiting the actual protection that the VPA affords volunteers. However, certain factors probably constrain governmental entities or nonprofit organizations from suing their own volunteers, factors that do not constrain injured plaintiffs—for example, the fear of scaring away all potential volunteers and the apparent unpopularity of punishing volunteers for "simple mistakes."

What Does the VPA Do for Organizations That Use Volunteers?

The VPA has no effect on the liability of any governmental entity or nonprofit organization for harm caused by one of its volunteers.[22] So if under state law an entity or an organization can be held "vicariously liable" for the actions of its volunteers (that is, if it can be held liable because of its relationship to the volunteer, not because it behaved negligently itself), the VPA does nothing to change this state of affairs. Further, if a governmental entity or a nonprofit organization is immune from suit under state law, the VPA makes no change (except as far as the injured parties are concerned, a point discussed in "How Does the VPA Affect Persons Harmed by Volunteers?" page 9).

On the other hand, the VPA specifically states that it does not affect any civil action brought by a governmental entity or a nonprofit organization against any of its volunteers.[23] Therefore, if an entity or an organization is sued for harm caused by one of its volunteers and is ordered to pay damages, it still may turn around and sue the volunteer, seeking either partial or complete reimbursement.

Why Preemption?

"Preemption" means that the federal government enacts a law that then replaces state laws inconsistent with it. The fact that the VPA preempts inconsistent state laws may be one of the statute's most interesting features. The legislative history of the VPA began in 1986. In its initial form the bill did not involve a federal mandate. Instead, it used Congress's power to impose conditions on federal money given to states.[1] Until 1991 this bill encouraged states to enact laws offering volunteers protection from liability by requiring the secretary of health and human services to *reduce* a state's federal social services grant by 1 percent if the state did not enact such legislation.[2] After 1991 and until 1997, the bill required the secretary to *increase* the grant by 1 percent for any state that did enact legislation giving liability protection to volunteers.[3]

In light of the VPA's long legislative history as a permissive rather than a mandatory measure, the sudden, late change in approach is striking. It is even more striking when one considers that it occurred in a Republican-dominated Congress. As the party traditionally known for vigorous support of states' rights, why would the Republicans pass legislation that so significantly restrains the states from tailoring their tort systems to fit their own volunteer situations?[4] A possible explanation is money: as enacted, the VPA costs the federal government nothing, whereas its earlier (post-1991) versions might have required significant expenditures in increased social services grants. As noted in the main article (note 34), the stated explanation (not entirely persuasive because the facts have been known since 1986) was the need to protect organizations that use volunteers on a nationwide basis.

Another interesting feature of the VPA's mandatory form is that now it probably is open to a constitutional challenge that it would not have faced in its permissive form. The authority cited for the VPA's preemption of inconsistent state laws is the Commerce Clause of the United States Constitution,[5] which gives Congress the power to regulate products and services that flow in or affect interstate commerce. According to the VPA's findings, volunteer service affects interstate commerce because volunteers provide services that paid employees or government social service programs would offer; suits against volunteers dissuade volunteers from serving, thus requiring expenditures to support what otherwise would be free. Critics of the VPA's preemption approach argue that there are few, if any, findings to support this assertion and that if the VPA is challenged as an unconstitutional exercise of Congress's power to regulate interstate commerce, it will be found unconstitutional.

This argument has some merit. In *U.S. v. Lopez*,[6] the United States Supreme Court found that the Gun Free School Zones Act, which made it a federal offense for a person to possess a firearm on school premises, was an unconstitutional exercise of Congress's Commerce Clause power because possessing a firearm on school premises was neither a commercial activity nor an activity in any way connected to interstate commerce. The *Lopez* opinion demonstrated a new willingness on the Court's part to question congressional findings in the Commerce Clause arena. However, the VPA probably is on sounder factual footing than the Gun Free School Zones Act. Also, it has one crucial provision that the Gun Free School Zones Act did not have: it allows states to opt out when the parties are engaged in activities that do not affect more than one state (as discussed in the last paragraph of the section in the main article entitled "What Kinds of Laws May the State Enact?").

Whether or not the anticipated constitutional challenge will occur and be successful, it raises the point that there are people who, with some cause, are not happy with the VPA's protection of volunteers.

Notes

1. U.S. Const. art. I, § 8, cl. 1.

2. *See, e.g.*, H.R. 5196, 99th Cong., 2d Sess. (1986); H.R. 911, 100th Cong., 1st Sess. (1987).

3. *See, e.g.*, H.R. 911, 102d Cong., 1st Sess. (1991). *See also* John Porter, *Essays on Issues: Volunteer Protection: The Time Is Now*, found at http://www.house.gov/porter/essay_hr911.htm.

4. Indeed, the Republicans did not just vote to approve the measure. A Republican representative from South Carolina, Bob Inglis, proposed the amendment that made the VPA a federal mandate. *See* H.R. 1167, 105th Cong., 1st Sess. (1997).

5. U.S. Const. art. I, § 8, cl. 3.

6. U.S. v. Lopez, 514 U.S. 549 (1995).

How Does the VPA Affect the Laws of North Carolina?

The VPA "preempts" (replaces) the laws of North Carolina (and all other states) to the extent that they are inconsistent with the VPA's provisions.[24] (For a discussion of preemption, see above.) North Carolina had a fairly small body of statutory law granting limited immunity to certain volunteers. These laws often granted less protection than the VPA does, although sometimes they granted similar protection. For example, as discussed later, G.S. 1-539.10 granted certain volunteers immunity when their conduct was not negligent. This law clearly offered less protection than the

Courtesy Girl Scout Troop 946

A volunteer (center) guides members of a Girl Scout troop in an activity.

VPA does. On the other hand, the Good Samaritan statute, discussed earlier, affords protection similar to the VPA's. The state has no laws that provide volunteers *more* protection from liability than the VPA does.

The result, then, is that volunteers who qualify for the VPA's protection are not governed by any of the state immunity laws that were enacted before the VPA. As is discussed later, the state may enact new laws that are not inconsistent with the VPA, but these laws may not reduce the level of protection to which a volunteer is currently entitled under the VPA. Further, there are state laws related to the issue of volunteer liability that are not touched on by the VPA. These probably remain good law.

Which State Laws Are Preempted?

Before the VPA most volunteers in North Carolina could be held fully liable for harm caused by negligence or intentional wrongdoing during their volunteer service. Although at first glance G.S. 1-539.10 seemed to grant volunteers of charitable organizations immunity from suit, it did so only when they were acting in good faith and providing services that were "reasonable under the circumstances." That phrase is the legal definition of behavior that is not negligent. G.S. 1-539.10, then, granted volunteers of charitable organizations immunity from suit when they least needed it—that is, when they would not have been liable for negligence anyway.

This lack of effective statutory law governing volunteer liability meant that the issue was governed by the common law (that is, judge-made law). Under the common law, a volunteer could be held liable if her or his behavior was negligent. Even though volunteer service was a freely given, uncompensated activity, a volunteer had a duty to exercise a reasonable degree of skill and care in performing it. The common law no longer applies to volunteers covered by the VPA.

North Carolina had several other laws that granted liability protection to specific groups of volunteers—for example, volunteer firefighters[25] and guardians ad litem[26]—but the protection was limited, as the VPA's is, to cases in which the conduct causing injury did not involve gross negligence, wanton conduct, or intentional wrongdoing. Although these laws did not conflict with the VPA, they added nothing to its provisions, and the volunteers in question now are covered by the VPA.

Which State Laws Remain Valid?

A North Carolina law gives sovereign immunity to governmental entities, and this law remains good. Under the doctrine of sovereign immunity (also known as "governmental immunity"), a governmental body such as a school board or a board of county commissioners may not be sued for harm resulting from its own negligence or the negligence of its officers or employees if the negligence occurs during the performance of a governmental function.[27] A governmental entity may waive this immunity, and thus consent to suit, by purchasing liability insurance.[28] Purchasing liability insurance waives immunity only for the *kinds* of claims covered by the policy and only up to the *amount* of coverage provided by it.

Laws that protect volunteers who are not covered by the VPA, such as G.S. 90-21.14, also remain valid.

What Kinds of Laws May the State Enact?

Although the VPA has replaced most North Carolina laws governing volunteers, the state may enact new ones consistent with the VPA. By VPA definition, certain kinds of laws are not inconsistent. The first category includes laws that provide additional protection from liability for "volunteers or [for] any category of volunteers in the performance of services for a nonprofit or governmental entity."[29] Laws fitting into this

category might expand the protection granted to *all* volunteers of governmental entities or nonprofit organizations. For example, the state might enact a statute providing that "no volunteer of a qualified entity shall be held liable for harm resulting from the performance of acts or omissions within the scope of his or her duties for the entity, provided that such acts or omissions do not amount to willful or wanton misconduct." Such action would expand the range of protected conduct from simple negligence to gross negligence. Laws fitting into this category also might expand the protection granted to *certain* volunteers of these organizations. Using the preceding example, a state statute might expand protection for volunteers serving on the board of directors but leave the standard where it is for direct-service volunteers. What is not clear about the "additional protection" category is whether a state may use it to protect volunteers serving entities that are not nonprofit or governmental. Most probably a state may.

Another set of laws that the state may enact consistent with the VPA focuses on balancing the protection the VPA grants to volunteers with safeguards to reduce the risk of harm and loss to persons who may be injured by volunteers.[30] For example, the state might enact laws requiring a governmental entity or a nonprofit organization to follow procedures for risk management, including mandatory training of volunteers.

Further, the state may enact laws that make governmental entities or nonprofit organizations liable for the acts or the omissions of their volunteers to the same extent that an employer is liable for the acts or the omissions of its employees. This kind of liability, also known as "vicarious" or "respondeat superior" liability, allows a third person to be held legally responsible for harm caused by a person who stands in a master-servant relationship with her or him, as long as the harm occurs within the course and the scope of that relationship. The most common example of a master-servant relationship is the employer-employee relationship. No North Carolina court has specifically addressed whether a volunteer can have a master-servant relationship with the organization she or he serves, but neither has any North Carolina court held that a volunteer *may not* stand in such a relation to the organization. Under general common law principles, it seems likely that the organization-volunteer relationship can be a master-servant relationship in some circumstances. Therefore, in all probability, governmental entities and nonprofit organizations already may be held vicariously liable for harm caused by their volunteers, and an official statute is not strictly necessary.[31]

Finally, the state may require a governmental entity or a nonprofit organization to provide a financially secure source of recovery for persons who suffer harm as a result of actions taken by a volunteer on behalf of the entity or the organization. This source of recovery may be an insurance policy, a risk-pooling mechanism, equivalent assets, or alternative arrangements that satisfy the state.[32]

The VPA also allows states to enact laws opting out of compliance with the VPA for civil actions in state courts against volunteers, when all parties are citizens of the state.[33] The North Carolina General Assembly has not enacted such legislation. Presumably this choice to opt out would not apply if the injured party named the volunteer's organization as a defendant and that organization was a multistate or nationwide organization.[34]

How Does the VPA Affect Persons Harmed by Volunteers?

The VPA may have considerable effect on persons injured by volunteers. By limiting their potential for recovering damages from volunteers who cause harm, the VPA may create a situation in which they cannot recover damages at all for their injuries. Furthermore, even when they can recover damages, the VPA limits the kind and the amount available.

The VPA completely eliminates a claimant's ability to recover damages in some circumstances. As discussed earlier, the VPA prevents a person injured by a volunteer serving a governmental entity or a nonprofit organization from recovering damages from the volunteer as long as the injury occurs under circumstances meeting the statutory criteria. If the volunteer is serving a governmental entity that is immune from suit, the injured person has no source of recovery. Although many governmental entities in North Carolina have waived their immunity by purchasing liability insurance, not all have (and recovery under the liability policy of those that have is restricted, subject to a set of rules that are not discussed here). Further, although nonprofit organizations are not currently immune from suit under state law, nothing in the VPA prevents the state from enacting a law to grant them immunity.[35]

Even when the organization served by the volunteer causing harm is not immune from suit, nothing in the

language of the VPA *requires* states to enact laws limiting liability only for volunteers who serve organizations that possess a secure source of financial recovery (although states are allowed to enact such laws). Thus, in states without such laws, a victim might bring suit against an organization whose volunteer has caused injury, only to find that the organization has no money with which to compensate him or her.

In addition to limiting (and sometimes eliminating) the opportunities for an injured person to recover damages, the VPA limits the amount that a victim may recover when she or he can bring suit against an individual volunteer. The VPA limits punitive damage awards against volunteers to cases in which the claimant establishes by clear and convincing evidence that the harm was caused by an action of the volunteer that constituted willful or criminal misconduct, or a conscious, flagrant indifference to the rights or the safety of the individual harmed.[36]

More important, the VPA limits recovery of noneconomic damages in cases against volunteers. "Noneconomic damages" means losses for physical and emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companionship, loss of consortium (as when a husband and a wife, for example, are no longer able to be together sexually), injury to reputation, and all other nonfinancial losses of any kind or nature.[37] In other words, the VPA limits the potential recovery for damages that are intangible—harder to measure than a week's worth of wages, for example. The VPA provides that a volunteer shall be liable only for an amount of noneconomic loss in direct proportion to the percentage of responsibility he or she bears for the harm to the claimant. (The court will render a separate judgment against each defendant in an amount determined pursuant to the preceding sentence.) This provision abolishes "joint and several liability," which allows an injured claimant to recover the entire amount of his or her damage award from one defendant if another of the defendants is incapable of paying.

In contrast, "economic damages" means any financial loss resulting from harm, including loss of earnings or other benefits related to employment, medical expense, costs for replacement services, loss due to death, burial costs, and loss of business or employment opportunities (to the extent that recovery for such loss is allowed under applicable state law).[38] Unlike recovery of noneconomic damages, recovery of economic damages is not limited, meaning that joint and several liability remains in effect for volunteers.

By limiting noneconomic but not economic damages, the VPA is likely to have the biggest effect on the most needy and vulnerable populations receiving volunteer services—unemployed persons, immigrants, persons with disabilities, children, and elderly persons—because these people most often will be unable to show damage to earning capacity, lost wages, or other financial elements.

Conclusion

Whether the VPA will achieve its desired result of limiting suits against volunteers and creating an atmosphere in which volunteers feel reasonably safe to provide services remains to be seen. Its critics dispute that fear of lawsuits causes people to refrain from volunteering, and they point to the lack of factual support for the proposition that limiting liability will increase volunteerism.[39] Critics also question the wisdom of removing the incentive—fear of liability—for volunteers to observe a standard of due care (the negligence standard). They argue that the VPA may create disincentives to observe risk-reducing behavior: volunteers will demand less training, be more willing to take unnecessary risks, or just plain care less about the risks they take. This pattern is encouraged, they continue, by the fact that the VPA does not *require* states to enact laws mandating risk-reduction techniques or imposing vicarious liability on organizations that use untrained volunteers.

On the other hand, as at least one supporter of the VPA notes, incentives for risk-reduction mechanisms always have been more effective at the institutional level than at the individual level. That is, generally volunteers do not demand training; the organization requires it.[40] And the reasons that the organization does so remain: many insurers make training a condition of purchasing liability insurance or specify it as a way of keeping premiums lower; the organization itself still is subject to suit for negligently employing unqualified volunteers; and the fewer the injuries caused by its volunteers, the smaller the chance that the organization will be held vicariously liable.

Notes

1. Volunteer Protection Act of 1997, 42 U.S.C.A. §§ 14501–14505 (1997).

2. Statement of Hon. Newt Gingrich, representative from Georgia, in *Volunteer Liability Legislation: Hearings*

on H.R. 911 and H.R. 1167 before the House of Representatives Committee on the Judiciary (hereinafter *Hearings*), 105th Cong., 1st Sess. (1997), 8.

3. Statement of Hon. Paul Coverdell, senator from Georgia, in *Hearings*, 1st Sess., 11.

4. Prepared statement of Hon. John Edward Porter, representative from Illinois, in *Hearings*, 1st Sess., 21.

5. *See, e.g.*, testimony of Rep. John Conyers (D-Mich.), in *Hearings*, 1st Sess., 41–43; testimony of Rep. Sheila Jackson-Lee (D-Texas), in *Hearings*, 1st Sess., 54; testimony of Andrew J. Popper, professor, American University College of Law, in *Hearings*, 1st Sess., 85–86.

6. VPA supporters most often cited a 1989 Gallup poll showing that (1) 1 in 10 nonprofit organizations reported volunteers resigning over concerns about liability, and 1 in 6 volunteers withheld their services because they feared exposure to a liability lawsuit; and (2) approximately 1 in 20 nonprofit organizations reported changing the structure of their board of directors and eliminating committees because of potential liability, and 1 in 7 reported eliminating programs and services that they believed were high-liability risks. *See, e.g.*, Anna Marie Kukec, "Volunteer Protection Act: Is Coverage Worth the Wait or Just a Constitutional Landmine?" (American Bar Association), found at http://dev.abanet.org/barserv/22-4vol.html.

7. 42 U.S.C.A. § 14503(a).

8. 42 U.S.C.A. § 14505(6).

9. Steve McCurley, "The Volunteer Protection Act of 1997," *Grapevine* (CAHHS, Sacramento, Calif.) (July/Aug. 1997): 10.

10. 42 U.S.C.A. § 14505(4)(a). The Internal Revenue Code defines tax-exempt nonprofit organizations as "corporations, and any community chests, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation . . . and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office." 26 U.S.C.A. § 501(c)(3).

11. 42 U.S.C.A. § 14505(4)(b).

12. The report from the House Judiciary Committee gives a cryptic qualification of this condition: "In order to fall within this exclusion, it would not be sufficient that the organization practice the conduct that forms the predicate of a crime referenced in that statute. That is, the organization's action must rise to the level of a crime." H.R. Rep. No. 101, 105th Cong., 1st Sess. (1997), *reprinted in* 1997 U.S.C.C.A.N. 152, 163.

13. Statements of Coverdell and Porter, in *Hearings*, 1st Sess., 11, 23.

14. 42 U.S.C.A. §§ 14503(a)(1)–(4), 14503(f)(1)(E).

15. W. Page Keeton et al., *Prosser and Keeton on the Law of Torts*, 5th ed. (St. Paul, Minn.: West Publishing, 1984), 212, sec. 34.

16. Testimony of Charles Tremper, J.D., Ph.D., senior vice-president, American Association of Homes and Services for the Aging, in *Hearings*, 1st Sess., 118–19.

17. The reasonableness of an action may come into the analysis in determining whether the volunteer has a defense. In the example of the hall monitor, the volunteer might explain that the student whom he stopped was running during a fire evacuation and thus was causing severe danger to the orderly evacuation of the building and that he used only as much force as was necessary to stop her from running.

18. "Crime of violence" is defined by reference to 18 U.S.C.A. § 16 as "(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

19. "International terrorism" is defined by reference to 18 U.S.C.A. § 2331 as "activities that (a) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (b) appear to be intended to intimidate or coerce a civilian population, to influence the policy of a government by intimidation or coercion, or to affect the conduct of a government by assassination or kidnapping; and (c) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum."

20. "Hate crimes" is defined by reference to the notes to 28 U.S.C.A. § 534 as "crimes that manifest evidence of prejudice based on race, religion, disability, sexual orientation, or ethnicity, including where appropriate the crimes of murder, non-negligent manslaughter; forcible rape; aggravated assault, simple assault, intimidation; arson; and destruction, damage or vandalism of property."

21. 42 U.S.C.A. § 14503(f)(1).

22. 42 U.S.C.A. § 14503(c).

23. 42 U.S.C.A. § 14503(b).

24. 42 U.S.C.A. § 14502(a).

25. G.S. 58-82-5(c).

26. G.S. 7A-492.

27. Minneman v. Martin, 114 N.C. App. 616, 442 S.E.2d 564 (1994).

28. G.S. 115C-42, -47(25).

29. 42 U.S.C.A. § 14502(a).

30. 42 U.S.C.A. § 14503(d).

31. For a more detailed discussion of the potential *respondeat superior* liability of an organization for harm caused by its volunteers, *see* Ingrid M. Johansen, "Legal Issues in School Volunteer Programs: Part III: Vicarious Liability of School Boards," *School Law Bulletin* 29 (Winter 1998): 1.

32. 42 U.S.C.A. § 14503(d).

33. The statute must declare the election of the state that the VPA will not apply, as of a date certain, to such civil action in the state; and contain no other provisions. 42 U.S.C.A. § 14502(b).

34. The reasoning behind this presumption is based on the VPA's legislative history. The primary reason given for making the VPA a federal mandate to the states rather than a permissive measure was that many organizations that use volunteers are national organizations (Big Brother/Big Sister, Boy Scouts, Girl Scouts, Red Cross, etc.) that do not have the time or the other resources to determine the standards of liability to which their volunteers will be held in each of the fifty states; to protect these organizations, a law that sets a uniform national floor for volunteer liability is necessary. *See, e.g.*, statement of Robert K. Goodwin, president and chief executive officer, The Points of Light Foundation, in *Hearings*, 1st Sess., 62; statement of Tremper, in *Hearings*, 1st Sess., 97–100; statement of Sen. Paul Coverdell, *Congressional Record* (daily ed. April 30, 1997), 143, S3827–30. Thus, allowing a state to opt out when both the injured person and the volunteer are residents of the state but the volunteer is providing services for a national organization, would make nonsense of the mandate's purpose.

35. Such legislative efforts seem unlikely, however, given the statutory abrogation of the doctrine of charitable immunity contained in G.S. 1-539.9.

36. 42 U.S.C.A. § 14503(e)(1).

37. 42 U.S.C.A. § 14505(3).

38. 42 U.S.C.A. § 14505(1).

39. H.R. Rep. No. 101, 105th Cong., 1st Sess. (1997), *reprinted in* 1997 U.S.C.C.A.N. 152, 164–65.

40. Testimony of Tremper, in *Hearings*, 1st Sess.,117. ■

A Profile of County Manager Government in North Carolina

Kurt Jenne

The governing boards of all 100 counties in North Carolina enjoy the managerial services of a chief administrator. All but one, Tyrrell County, have adopted a county manager form of government as authorized in Section 153A-81 of the North Carolina General Statutes (hereinafter G.S.).[1] But that simple statistic conceals the variety of available options and the diversity of resulting arrangements. The General Statutes provide each county with the flexibility to create a legislative-administrative arrangement that works best in the context of its unique history, culture, politics, and changing requirements.

In February 1998 the Institute of Government sent a short survey to each county manager to find out more about how the board of county commissioners actually uses the administrative resources provided by the manager.[2] North Carolina's county managers were gracious in their willingness to assist in this research effort. Every one of them completed and returned the survey, providing a 100 percent sample as the basis for this article.

Casual observation had suggested that there might be more variation in the specific arrangements among the county manager, the board of commissioners, and various department heads than in those among their counterparts in the 182 towns and cities that employ the analogous council-manager form of government. The survey results confirmed this impression. A rich variety of stories brought each county to its current arrangements, seldom along a straight and deliberate path. Partisan elections, a mixture of elected and appointed administrative officers, some differences in the structure authorized by the General Statutes for cities and counties, and complications that arise from the county acting as an agent of the state in several areas of service probably account in part for the variation. This article identifies and describes patterns in county governance and management as of the beginning of 1998.

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Use of the County Manager Form of Government

North Carolina has a long tradition of using professional management to promote efficient and effective local government. In 1917 Catawba and Caldwell counties each secured authorization by special acts of the General Assembly to appoint a county manager, although neither did so until many years later.[3] In that same year, Buncombe County designated the chair of the board of commissioners as its full-time county manager. In 1927, after a few years of experience with a general law allowing cities to determine their form of government by local action, the General Assembly passed similar legislation allowing counties to choose their form of government without special legislation.[4] In 1929 Robeson County became the first county in the United States to establish an appointed office of county manager,[5] and in 1930 Durham County became the second to do so.[6]

Although these counties were ahead of their counterparts in other states, most counties in North Carolina did not move quickly to adopt the new form of government. By 1960 only twelve had provided for the

appointment of a county manager or the election of a chair to serve as county manager.[7] However, in 1970 thirty-five were using the county manager form, and by 1980 eighty-two had adopted it. In August 1998 Jackson County became the last county in the state to abandon the arrangement of electing the chair of the board of county commissioners to be the full-time salaried county manager as well. All one hundred counties now employ a professional administrator hired by the board of county commissioners.[8] In Columbus, Swain, and Tyrrell counties, the commissioners employ a "county administrator" who performs functions that are authorized for a county manager. Among these, only Tyrrell has not formally adopted the county manager plan.[9]

Characteristics of County Manager Government

In North Carolina, when a board of commissioners adopts the county manager plan, it has more flexibility than a city council does in how it chooses to implement the plan. The board may hire a manager solely on the basis of his or her professional qualifications to hold no other office simultaneously and to serve at its pleasure.[10] This is the only option available to a city council that adopts the council-manager form of government, but a county has alternatives. A board of county commissioners may confer the duties of county manager on the chair, on any other commissioner, or on any other county employee.[11] He or she then serves as manager at the pleasure of the board while performing the duties of the other office. Unlike cities, counties do not have to keep a particular form of government for any period after adopting it.[12] Nor may voters force a referendum by petition to create or abandon the form.[13] Consequently, county commissioners are able to modify their arrangements when and as they wish.

When a county adopts the manager form, delegation of the board's authority to the manager is discretionary.[14] When a city does so, the General Statutes require that the manager exercise the authority to appoint, suspend, and remove all employees whose appointment is not otherwise provided for by law.[15] The exceptions are almost always the city attorney and often the city clerk. In counties the commissioners decide whether to delegate hiring and firing authority to the manager. Even when they do delegate the authority, though, appointment of many department heads is otherwise provided for by law. The sheriff and the register of deeds are separately elected. The commissioners usually appoint the attorney, the clerk, the tax supervisor, and the tax collector. Boards appointed by the commissioners, in turn, appoint the health director and the social services director after consultation with the state agencies that administer those services. The commissioners and the state extension service jointly appoint the extension agent, and independently elected or appointed boards appoint the chief administrators for elections, schools, and hospitals. Thus the formal supervisory authority of the county manager is more circumscribed than that of the city manager. This opens the door to a variety of informal relationships as he or she exercises managerial authority and responsibility according to the expectations of the board of commissioners. Typically each manager and board work out the details of those relationships to fit the operational needs and the culture of their community.

Nature of the Manager's Position

As noted earlier, until August 1998 Jackson County combined the offices of chief elected official and chief administrative officer in one person on a permanent basis. There the chair was elected to serve in both capacities. A number of other counties have used this arrangement in the past—most recently, Buncombe, Clay, Haywood, and Madison.

Only a few of the state's current managers were able to explain what prompted the commissioners of their counties to adopt the manager form when they did. The specific reasons appear seldom to have been documented. Most of the managers who stated or speculated about the reasons cited a movement toward more efficient management of county operations, which were growing and becoming more complex as county populations increased and as federal and state regulations and programs became more complicated to administer. In two cases, managers indicated that they had asked for formal adoption of the county manager plan as a condition of accepting their jobs. In Wayne County a group of business leaders on the board believed that the county should have a professional chief executive officer and worked to garner backing for such a position. Likewise in Vance County, two "progressive" commissioners developed support for the change.

Counties made the transition in a variety of ways. In 1978 Duplin County convened a study committee to investigate the experience of counties that used the

county manager form. Subsequently the committee recommended that the commissioners adopt it. Rutherford County hired a "county administrator" to see how that arrangement would work and, after a year of good experience, adopted the county manager form in 1982. In 1983 Buncombe County secured special legislation from the General Assembly separating the offices of chair and county manager, then hired its first separate manager when the new board was seated in 1984. A Haywood County referendum in 1988 allowed the incoming commissioners to hire a manager in 1990.

A number of county managers serve in more than one administrative capacity. Eight[16] indicated that their commissioners also appoint them as clerk to the board. The managers in Bertie and Tyrrell counties serve as tax assessor, and the Bertie manager also is tax collector. Among the department head responsibilities that county managers exercise, the most prevalent is personnel officer (40). Other roles are purchasing agent (8),[17] finance officer (7),[18] solid waste director (2),[19] public information officer (1),[20] emergency management director (1),[21] county planner (1),[22] and water superintendent (1).[23] From 1990 to 1993, Brunswick County's attorney also served as county manager, and, at the time of this survey, Greene County's attorney was interim county manager.

Authority in Personnel Matters

One of the most important features of the council-manager form of government, on which the county manager form is modeled,[24] is the authority of the manager to hire, fire, and discipline most employees on behalf of the elected body, with as few exceptions as possible.[25] As mentioned earlier, this concentration of supervisory authority is mitigated in North Carolina counties by the existence of separately elected officials, by the appointment of some department heads by separate boards, and by the commissioners' discretion in granting authority to the county manager. Nevertheless, in 85 of the 100 counties, the commissioners have granted the county manager hiring and firing authority over personnel who are not otherwise excepted by statute.[26] A majority (66) of the managers who have clear appointment authority said they nevertheless take the time to discuss pending appointments with commissioners. Thirty-eight consult the whole group, 17 the chair only. The remaining 11 said that the extent to which they discuss a pending appointment with commissioners varies depending on the importance or the prominence of the position being filled.

Financial Control

The authority to control expenditures that have been authorized by the elected body also is an important management tool.[27] The survey asked county managers about budgetary and financial controls for seventeen departments that might typically be found within the county manager's sphere of responsibility because they were likely to be controlled significantly by the commissioners or by the county manager on their behalf.[28] The operations of sheriffs and registers of deeds were not included because those positions are separately elected. For the most part, county managers reported that they were expected to evaluate and modify the budget requests of all these departments in formulating a recommended budget for the commissioners. There were only a few exceptions.[29]

Twenty-nine county managers felt that they were in a position to control almost all these departments' expenditures substantially in order to keep them within the boundaries established by the commissioners once the board adopted the county budget.[30] Only nine said that they felt their control was limited or nonexistent without specific instructions or concurrence from the commissioners.[31] In the other sixty-two counties, managers believed that their control of expenditures was most limited with respect to the health, social services, and mental health departments. Thirty-six of these managers had limited or no control over expenditures in two or more of these agencies.

Operational Control

Logic and experience suggested that county managers would exercise operational authority relatively less frequently in areas where the statutory authority for appointing the department head lay with the commissioners and other bodies. Indeed, managers indicated the least operational control in health, social services, and mental health. Seventy-seven percent had limited or no control over the social services department, 78 percent over the health department, and 90 percent over mental health activities. However, a small percentage of managers did have significant control over each of these departments. Wake County has exercised its authority under G.S. 153A-77 to consolidate the three

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Professional Profiles: Four North Carolina County Managers

North Carolina counties have the authority to use a variety of structural arrangements to create a system that works best in their individual locales. As a result, the job of county manager and the relationship between the county manager and the commissioners vary from county to county. Here are a few examples.

John Bauer, Pender County Manager

A native of Long Island, New York, John Bauer studied government at the University of Notre Dame and public administration at Syracuse University before going to Raleigh, North Carolina, in 1976 to work for the National Association of Attorneys General. He left North Carolina for two years to serve as administrative assistant to the city manager of Little Rock, Arkansas, then returned to work on capital projects and annexation plans in Wilmington's Department of Public Works. In 1986, by then director of utilities for the city, he decided to move to nearby Pender County as its manager.

As manager, Bauer also holds the titles of clerk to the board, personnel officer, purchasing agent, and solid waste manager, besides his statutory responsibility as budget officer. The third administrator hired by the commissioners, he is the first to hold the title of county manager and to have authority over personnel actions as permitted by law. He has worked at streamlining management, and he names, as one result, ending the practice of having all department heads attend commission meetings in their entirety. Today department heads spend that time running their units while the county manager provides staff support to the commissioners when they meet. Also, Bauer and the commissioners now review the county budget on a two-year horizon. Doing so gives them all a better sense of the long-term effects of the budget, he thinks.

One of the most satisfying accomplishments of Bauer and the commissioners has been to build the county's fund balance back up from nothing in 1993 while reducing the county property tax rate twice, once right after reevaluation and once again after that. The county has won three Distinguished Budget awards and two certificates of achievement in financial reporting from the Government Finance Officers Association of the U.S. and Canada, and recognition from the North Carolina School Boards Association in 1996 for outstanding support of schools. Five years ago the commissioners gave Bauer the go-ahead to develop a performance evaluation and merit system for county employees, which the board subsequently adopted. The board also approved Bauer's proposal to use the Government Service Training Network to conduct training locally that the county could not afford to send its employees to attend elsewhere.

Bauer's biggest frustration is "not enough time in each day," especially with the demands of the other offices he holds. He thinks his greatest challenge in the next few years will be to help the commissioners deal effectively with Pender County's growth rate—one of the fastest in the state.

Willie Best, Former Robeson County Manager

A native of Northampton County, Willie Best studied political science at North Carolina Central University before earning a master's degree in public administration from American University. He came back to North Carolina in 1981 to work for the Roanoke-Chowan Housing Authority (in Halifax County), managing federal Community Development Block Grants. In 1983 he accepted employment at the State Division of Community Assistance, where he helped administer those grants for communities all over the state. In 1987 he became assistant manager of Wilson County. Eight years later he was chosen to be manager of Robeson County, which has the longest official record of using the county manager form of government in the United States. Best left Robeson County in June 1998 to become assistant city manager of Falls Church, Virginia.

Best describes Robeson County as "very political," its population balanced among Native Americans, African

Americans, and whites. He accepted the job of county manager on the condition that the commissioners grant him hiring and firing authority, as provided in the General Statutes. Hiring, promotions, and discipline are sensitive issues in Robeson County politics, and, according to Best, the manager must be more skilled than usual in making decisions in those areas. During his tenure, he says, he searched for the advantages of the county's racial diversity and tried to turn them to the benefit of the county.

Best sees economic development as one of his most satisfying accomplishments—not what he did personally but his recruitment of a skillful economic development director, who has succeeded in attracting firms to the county in the last eighteen months. His most frustrating moments came in working with the board to change the long-time practice of individual commissioners involving themselves in the work of county employees and managers. When he went to Robeson County, some employees worked openly on county commissioners' election campaigns, and many called commissioners directly whenever they disagreed with the manager or his decisions. Best thinks that the commissioners and employees now understand the potential difficulties in such practices and that county government is improving in those areas.

In Best's view the most important challenge for his successor is to continue the progress that he and the commissioners have made in developing a highly professional relationship among commissioners, county manager, and employees.

Graham Pervier, Forsyth County Manager

When Graham Pervier received his master's degree in planning and urban development from the University of Virginia in 1969, he was attracted to North Carolina by the reputation of Governor Terry Sanford. He went to work for the "Little Washington" office of the State Division of Community Planning, helping communities in Beaufort and Craven counties prepare plans for growth and development. His subsequent work in the Raleigh office of the Department of Local Affairs on the emerging concept of regional councils for North Carolina led the chair of the Robeson County Commissioners to invite him to Lumberton to direct the new Region N (now Lumber River) Council of Governments. His work from 1971 to 1973 with Bladen, Hoke, Robeson, and Scotland counties developed his interest in county government. When Currituck County began looking for a manager who had the technical skills to deal with intense development pressures, they found that person in Pervier.

When Pervier arrived, H. D. "Buster" Newbern, who had been chair for twenty-five of his twenty-eight years on the board, asked wryly if the commissioners still had to meet once a month now that they had Pervier. Pervier's appointment included duties as clerk to the board, planning director, and, when the incumbent died, finance officer. Out of kindness, he was told that if he did not like to hunt, he had better stay home for the first several days of the hunting season so that people would not think him weird. He assisted county officials in a deliberate effort to zone the county to cope with the development pressures of being a beautiful place close to an urban metropolis in Tidewater Virginia. He also began a process that ultimately brought water and sewer services to the county.

In 1977 Pervier was lured to Beaufort County to become its second manager. In 1980 he moved to Forsyth County, where he first worked as assistant manager, then as manager when H. L. "Pete" Jenkins retired in 1987.

Pervier points out that Forsyth County managers tend to have long tenures. Now in his twelfth year, he still enjoys trying to build on the county's tradition of sound management. According to Pervier, the manager is given a lot of latitude by a board of commissioners that has had continuity of membership and leadership, appreciates good business practices, understands the management of large organizations, and has enjoyed success in its relationships with past county managers.

Pervier cites the budget process as his most satisfying accomplishment, besides his good relationship with the commissioners. Considerable help from capable directors of finance and of budget and management got the county through some tough times when revenues became tight in the early 1990s. He likes the ability of the county commissioners and staff to get things done smoothly and with minimum fuss, and he feels lucky to have a good relationship with other administrators like the sheriff and the directors of health and social services. He likes least to deal with tough personnel matters, and he agonizes over them.

Pervier thinks that the biggest challenge he faces as manager in the next few years is to meet the expectation that things will continue to get done without any tax increase. Forsyth has not enjoyed the same rate of growth and development as other urban counties in the state, such as Guilford, Mecklenburg, and Wake. Yet Forsyth has been spared many of the problems that normally come with a higher growth rate. Overall, Pervier considers himself very fortunate to be sitting in his office under the watchful eyes of Francis Fries, who in 1849 became the first chair of the Court of Pleas and Quarter Sessions of the County of Forsyth.

Professional Profiles, *continued*

Dan Robinson, Chair, Jackson County Commissioners, and Jackson County Manager

Dan Robinson has served as chair of the Jackson County Board of Commissioners *and* as Jackson County manager since December 1996. Jackson County was authorized to use the county manager form in 1931. A special act of the General Assembly authorized the election of a chair who also would be the "administrative head of the county for the board of commissioners"(1931 N.C. Pub.-Local Laws ch. 144). In 1992 a referendum to separate the two offices failed; Jackson County citizens appeared to be satisfied with how the existing system worked. In October 1996, chair/county manager (and Democrat) T. C. Lewis, presiding over a board of four Republican "part-time" commissioners, resigned both offices too late for voters to elect a new chair for the remainder of his term. Jackson County Democrats designated Robinson to serve as chair (and therefore as county manager) until the 1998 election. The four part-time commissioners then passed a resolution separating the offices of manager and chair, and they prepared to appoint a new county manager. But the court stayed their action pending a decision on whether the commissioners might use the General Statutes to appoint a manager or whether Jackson County's special act would apply until it was modified or repealed.

Robinson went to Jackson County in 1946, fresh from the United States Navy. He worked in the Athletic Department of Western Carolina University for the next thirty-one years, thirteen as the university's head football coach and a member of the faculty. During those years he was active in the Democratic Party, which ultimately chose him to complete Lewis's term.

During the week Robinson is county manager. He becomes chair of the board of county commissioners during its two monthly meetings. As chair, he helps make policy; then, as manager, he carries out the will of the board through the county staff. During his tenure Robinson has discouraged the former practice of individual commissioners giving instructions directly to county staff, in order to make staff available for work assigned by the commissioners acting as a body.

Robinson names as his most satisfying experience so far formulating a budget proposal last year that was well reasoned and fiscally responsible enough to earn the acceptance of the entire board of county commissioners with few changes. He hopes that he will be equally successful this year. Ironing out the practical details of department supervision and the commissioners' rules of procedure in order to increase efficiency in both areas has been among his most difficult and frustrating tasks. He regards them as the biggest challenge for the Jackson County manager in the next few years.

That is a challenge Robinson's successor will have to take up. In July 1998 the North Carolina Court of Appeals ruled that the commissioners could exercise their statutory authority to change Jackson County's form of government, to hire a full-time county manager, and to reduce the chair's salary accordingly. By that time Robinson had won the Democratic primary election for state senator from the Twenty-ninth District. That meant that he would not run for chair again in the fall and would end his county service in December when the new commissioners took their seats. The board passed a resolution separating the two offices and reducing the chair's salary, then hired an interim county manager to serve until the new board is seated, giving it the opportunity to appoint the next Jackson County manager.

—*continued from page 15*

functions into one department reporting to the county manager. Mecklenburg County, the only other county qualified by population[32] to do so, still maintains separate departments.

Seventy managers reported little or no operational control over the board-appointed county attorney. Twenty-seven indicated significant operational control, but the survey did not reveal the nature of the relationship.[33] This might indicate either authority granted informally by the board of commissioners or a working relationship with the attorney that permits the manager to suggest or direct the allocation of legal resources among various needs in county government.

County managers also reported significant operational control over three other department heads normally appointed by the board: the clerk, the tax assessor, and the tax collector. Fifty-seven counties now have consolidated the last two offices into a single one, usually calling it the "tax administrator."[34]

At least 70 percent of the managers indicated that they exercised at least significant control over opera-

tions in nine of the other ten departments included in the survey, the highest proportion controlling budget (88 percent), the lowest proportion recreation (72 percent). As for that tenth department, economic development, only 57 percent of the managers whose counties had one said that they had significant control over it.[35]

Conclusion

The flexibility that G.S. 153A-81 allows commissioners to structure their county government, including the relationship among the board, the manager, and the principal department heads, has produced a variety of arrangements adapted to the particular culture, environment, and changing functional needs of each of North Carolina's 100 counties.

North Carolina is moving away from the days when county government was wryly characterized as "country government." As the counties gain residents who need or are accustomed to services traditionally provided by towns and cities—planning, regulation of development, and recreation, to name a few—county government is becoming increasingly complex. County operations that are efficient and effective will continue to increase in importance.

North Carolina is fortunate to have in place a system that is designed to facilitate good management of resources and delivery of necessary services to citizens in each county, according to its particular needs and the desires of its elected officials and the citizens whom they serve.

Notes

1. In fact, the Tyrrell Board of County Commissioners employs a "county administrator" whose duties are very similar to those of a county manager. However, the commissioners have not adopted a resolution establishing the county manager form.

2. Aaron Gallagher, a first-year graduate student in the Master of Public Administration Program at The University of North Carolina at Chapel Hill, helped design the questionnaire, supervised its printing and distribution, cajoled managers to respond, and tabulated the results to be used as the basis for this article.

3. 1917 N.C. Pub.-Local Laws ch. 433 (Catawba), ch. 690 (Caldwell). At its organizational meeting in 1936, the Catawba Board of County Commissioners, having decided that the county needed an executive to manage the county's affairs when the board was not in session, voted to hire Nolan J. Sigmon as county accountant with the intention of making him county manager. In March 1937 the commissioners passed a resolution adopting the county manager form, which had by then been authorized by Chapter 91 of the Public-Local Laws of 1927 (now G.S. 153A-81), and appointed Sigmon to the post of county manager. Caldwell County did not employ a county manager until 1967.

4. 1927 N.C. Pub.-Local Laws ch. 91, §§ 5–8, modified and recodified in 1973; now G.S. 153A-81, *Adoption of county manager plan; appointment or designation of manager;* and G.S. 153A-82, *Powers and duties of manager.*

5. 1929 N.C. Pub.-Local Laws ch. 127. Robeson is the only county in the United States to have had the appointed-manager form of government continuously since that time.

6. The International City/County Management Association (ICMA) lists Durham County as having adopted the form in 1930.

7. In Catawba, Davidson, Durham, Forsyth, Gaston, Guilford, Hertford, Robeson, and Rockingham counties, commissioners appointed a separate county manager. In Buncombe, Haywood, and Jackson counties, the elected chair served as county manager. In 1983 Buncombe County secured passage of a special act to separate the offices of county manager and chair, which took effect in December 1984 (1983 N.C. Sess. Laws ch. 129). Haywood County held a referendum in 1988, which resulted in the separation of the offices of chair and county manager when the new board was seated in December 1990. The Jackson County Commissioners voted in 1996 to separate the offices. The action was challenged but was upheld by the court of appeals in July 1998.

8. At the time this survey was conducted (February–April 1998), the chair of the Graham County Board of Commissioners was performing the duties of county manager after the full-time manager had resigned. This arrangement will continue until the 1998 election, after which it is uncertain what arrangement the board will choose.

9. The county administrator in Tyrrell County also serves as finance officer, budget officer, and tax assessor. He makes recommendations to the commissioners with regard to hiring and firing personnel. From 1975 to 1982, this position was called "county coordinator."

10. G.S. 153A-81(1).

11. G.S. 153A-81(2), (3).

12. G.S. 160A-107 requires that a city continue in force, for at least two years after the beginning of the term of office of the officers elected thereunder, any amendments made to the form of government that are allowed under Article 5.

13. G.S. 160A-103. The old law provided for referendum by petition and for retention for twenty-three months after a successful vote to change the form (1927 N.C. Pub.-Local Laws ch. 91, §§ 9, 10), but this provision was not carried over when the act was rewritten in 1973.

14. G.S. 153A-82(1). "He shall appoint with the approval of the board of commissioners and suspend or remove all county officers, employees and agents except those who are elected by the people or whose appointment is otherwise provided for by law. The board may by resolution permit the manager to appoint officers, employees, and agents without first securing the board's approval."

15. G.S. 160A-148(1).

16. Alexander, Carteret, Duplin, Greene, Hoke, Pender, Swain, and Yadkin.

17. Bladen, Camden, Caswell, Lenoir, Northampton, Pender, Person, and Yadkin.

18. Alamance, Beaufort, Chowan, Gates, Onslow, Randolph, and Scotland.

19. Pender and Washington.

20. Caswell.

21. Hyde.

22. Jones.

23. Washington.

24. The form of local government using an executive or an administrator appointed by and responsible to an elected legislative body was originally proposed by Richard Childs in 1910 for Lockport, New York. The concept was incorporated into the Model Cities Charter of the National League of Cities in 1915 and soon began to be adopted by municipalities and counties in many parts of the United States. In 1917 the North Carolina General Assembly gave authority to cities to adopt the council-manager form by local action (1917 N.C. Pub.-Local Laws ch. 136, pt. 5). The statutory authority that in 1927 permitted counties to adopt the county manager form by local action was similar in provisions and language to the 1917 statute for cities.

25. The International City/County Management Association's "Criteria and Guidelines for Recognition" include the provision that "[t]he manager shall have authority by legislation for the appointment and removal of at least most of the heads of the principal departments and functions of local government" (adopted Oct. 11, 1969; rev. July 22, 1989). "Criteria and Guidelines for Recognition," in ICMA, *Who's Who in Local Government Management, 1997–98* (Washington, D.C.: ICMA, 1997), 390.

26. In addition, the Surry County manager exercises this authority over all employees of the departments for which the manager is responsible except the department heads, and the Union County manager has the authority to discipline and fire employees without the commissioners' approval but not to hire them.

27. "The manager shall be designated by legislation as having responsibility for preparation of the proposed budget for the council's consideration and *having responsibility for implementation of the council's approved budget*" (emphasis added). ICMA, *Who's Who*, 390.

28. Included were attorney, clerk, finance officer, budget officer, personnel director, tax assessor, tax collector, purchasing agent, planning director, engineer, recreation director, public information officer, economic development director, management information services (MIS) director, health director, mental health director, and social services director.

29. In Ashe, Avery, Hertford, Martin, and Swain counties, the manager does not modify the requests made by the health, mental health, and social services directors. In Pasquotank the manager does not modify the health or mental health requests. In Catawba, Hertford, and Richmond, only the mental health request goes forward as submitted. The Brunswick and Davidson county commissioners review the economic development budget as submitted by the director.

30. Alamance, Bertie, Bladen, Buncombe, Chowan, Cumberland, Franklin, Guilford, Haywood, Iredell, Johnston, Jones, Lenoir, Lincoln, Madison, Martin, McDowell, Montgomery, Nash, New Hanover, Orange, Person, Pitt, Richmond, Sampson, Scotland, Stokes, Vance, and Wake counties reported the manager exercising at least significant financial control over all the departments listed.

31. The managers in Avery and Graham counties indicated no direct authority to control expenditures. The managers in Caldwell, Clay, Harnett, Jackson, Pasquotank, Surry, and Union indicated very little direct authority to control the expenditures of most departments.

32. G.S. 153A-77 applies only to counties with a population in excess of 425,000 and therefore only to Mecklenburg and Wake counties.

33. Three managers did not answer this question.

34. In Surry County the title is "tax director"; in Wake County it is "revenue administrator." Buncombe, Gates, Haywood, Madison, and Transylvania counties call the combined office "tax assessor." In Haywood, Henderson, Madison, and Transylvania counties, the tax collectors are elected.

35. The following proportions of managers reported having at least significant operational control over the other seven departments: finance (75 percent), personnel (80 percent), purchasing (82 percent), planning (78 percent), engineering (80 percent), public information (85 percent), and MIS (74 percent).

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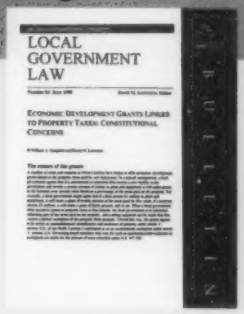

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Living with the Plant Kingdom at the North Carolina Botanical Garden

Peter S. White and Charlotte Jones-Roe

The plant kingdom is so central to humans' lives that we are in danger of taking it for granted. Plants nourish us, furnish valuable medicines (from aspirin to the recently discovered taxol), provide oxygen, create the lush greenery around us, and limit the runoff of water, soil, and fertilizers to streams and rivers. Plants brighten our world and lift our spirits with flowers and fruits. They even perfume the air around us. Of course, there also are problem plants, such as the wind-pollinated ones that cause allergies like hay fever. Other plants are poisonous or are aggressive weeds that we must fight in gardens, agricultural fields, nursery beds, and forests. For good or for ill, though, plants create the human habitat, comprising everything from our wilderness forests to the landscaping of our homes and workplaces.

Even recent arrivals can see that the human habitat in North Carolina is changing. The question that North Carolinians face is not whether the state will continue to develop but how. The quality of development will depend, in part, on how we humans choose to live with the plant kingdom around us.

(Background) Kudzu far exceeded expectations of its ability to control erosion and now is one of the most invasive plants in the southeastern United States. Photo by John L. Randall

The authors are director and assistant director, respectively, of the North Carolina Botanical Garden, The University of North Carolina at Chapel Hill.

It may come as a surprise that these issues are as important to botanical gardens as they are to society at large. Once botanical gardens focused inwardly, displaying plant diversity within their own borders and showing little concern for the world beyond. Today, however, the very plant diversity that gave gardens a reason for being, not to mention a supply of plants for display, is threatened by human development. Gardening itself involves choices about renewable resources like water and potentially threatening agents like fertilizers and pesticides. As a result, gardens are taking on new roles in research, conservation, and education. Zoos, too, have gone down this path, actively addressing conservation concerns.

The North Carolina Botanical Garden, a part of The University of North Carolina at Chapel Hill, seeks to provide the state and the region with the knowledge required for wise choices about the human habitat, in gardening, in the woodlands of backyards, along the greenways that line streams, and in deeper tracts of natural areas. As a public service unit of the university, the Garden has a special responsibility to help close the gap between academic and public knowledge in these areas.

Because of warmth and humidity, North Carolina is rich in gardens, and they are found in all parts of the state. There are fifty-one public gardens and many

important private gardens. Some of the best are at public and private universities. The state's university and community college systems house a number of important institutions: the J. C. Raulston Arboretum at North Carolina State University, the UNC-Charlotte Botanical Gardens, the Botanical Gardens of Asheville, the North Carolina Arboretum near Asheville, the Sandhills Horticultural Gardens, the Wilkes Community College Gardens, and the Campus Arboretum at Haywood Community College. Other university gardens include the Davidson College Arboretum and the Sarah P. Duke Gardens.

Among all the foregoing institutions, and even among the 300 major North American gardens, the North Carolina Botanical Garden always has had a distinctive focus and a leadership role. The Garden's staff, aspiring to make it a conservation garden, work along all parts of the human-to-nature continuum.

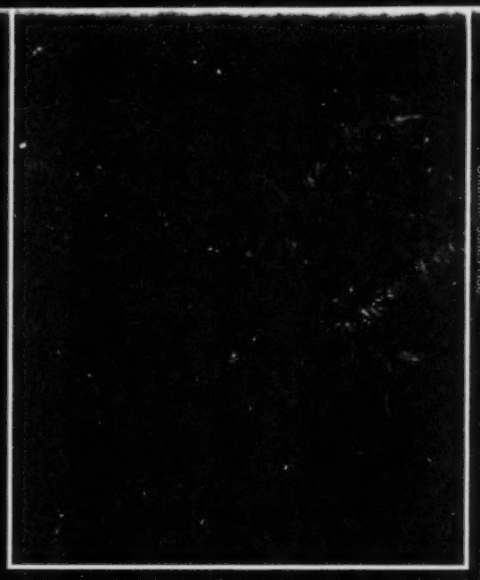
Visitors to the "seen" Garden behold its celebration of plant diversity and beauty in displays and natural woodlands. There also is an "unseen" Garden—lands and projects that the average visitor to the display garden does not encounter. This article briefly describes the seen Garden and its themes and then turns to the unseen Garden to illustrate what botanical gardens can do beyond botanical garden walls. The article starts with a description of North Carolina's plant diversity, from which the Garden draws its inspiration.

North Carolina's Plant Kingdom

North Carolina is a magnificent part of the plant kingdom. Its environments range widely. To the west are the highest mountains east of the Black Hills of South Dakota (Mount Mitchell is the highest point in eastern North America, at 6,684 feet), which have plant species from as far away as Hudson Bay. In the east is the warm Coastal Plain, which has the most northerly palm species in North America and even a species of orchid that lives on tree branches (both palms and "epiphytic" orchids are decidedly tropical growth forms).

The environmental variety of North Carolina produces impressive plant diversity. Some 4,000 species of "higher plants" (flowering plants, conifers and their relatives, and ferns and other primitive vascular plants) live here. The Blue Ridge Mountains have more tree species (approximately 100) than all of Europe.

Among the state's plant species are some truly unique forms. For example, the Southeast is a global



Charlotte Jones Roe

Rob Gardner

Visitors to the North Carolina Botanical Garden enjoy seasonal displays of native wildflowers: (top) In late summer, cardinal flower blooms brilliant red, here against a background of native ferns. (center) Phacelia, or scorpion weed, carpets the shady woodland garden in spring. (bottom) Crested iris, with its rich purple blooms, is a spring favorite.

Rob Gardner

center of diverse carnivorous plants, equaled only by the highlands of Venezuela and places in Australia. These amazing plants use insects as a mineral supplement, obtaining precious elements scarce in their sandy, acidic, nutrient-poor soils. Among the carnivorous plants is the Venus flytrap, known the world over for leaves like bear traps, yet native to only twenty-two counties in North and South Carolina. There is nothing even closely related anywhere else. Charles Darwin called it "the most wonderful plant in the world."

Sadly the Venus flytrap story also illustrates why gardens must be involved in larger conservation issues. This species has disappeared from a third of the counties in which it once lived because of destruction and drainage of the moist savannas on which it thrives, as well as direct harvest for the horticultural trade and for medicine (an herbal remedy, Carnivora, is made from the plant).

North Carolina's plant diversity is a treasure of the state, already used in a variety of ways. A rich medley of hardwood trees produces awe-inspiring fall color that contributes to tourism in the mountains. A variety of herbs yield medicines, including the world-famous ginseng. Horticulturists long have grown many North Carolina plants, including the state flower, the flowering dogwood.

Joe-pye weed attracts swallowtails and a host of other beautiful pollinators. Gardeners can support conservation through the use of propagated wildflowers rather than plants collected from the wild.

Rob Gardner

The Seen Garden

Three themes pervade the seen garden: First, the plant kingdom is an attractive, interesting, and important place and is diverse in forms, colors, uses, and seasons of flower and fruit. Second, human life depends on plant diversity for everything from the pleasures of plant beauty to soil erosion control, foods, and medicines. Third, humans must learn to be wise stewards of plant diversity to give it the best chance of survival for future generations.

The Garden's plant collections and nature trails express these themes. The Coker Arboretum on the main university campus is the Garden's oldest unit, dating from 1903. This five-acre collection includes the oldest specimens of several southeastern trees growing in cultivation. In the early 1900s, the arboretum contained a garden of medicinal plants for teaching medical and pharmacy students, a purpose since passed to the Garden's main plant displays. The Garden's most recent unit is the Mason Farm Biological Reserve, a 367-acre tract devoted to teaching, research, and conservation. This farm landscape includes remnants of the old-growth forest that once dominated the Chapel Hill area. Some trees in Mason Farm woodlots surpass 250 years of age, predating European settlement in Chapel Hill.

Two components of the North Carolina Botanical Garden proper focus on natural diversity: the Habitat Collections, which display the plants of the major physiographic provinces of the Southeast; and the Plant Families Garden, which shows the evolutionary "tree" of the plant kingdom. There also are extensive collections of native perennials, southeastern ferns, carnivorous plants, and aquatic plants, and a system of nature trails. The dependence of human life on plants is the special focus of the Mercer Reeves Hubbard Herb Garden, which exhibits wild and cultivated plants used by Native-American cultures, medicinal plants (arranged by type of ailment treated), and culinary, economic, poisonous, evergreen, and shade herbs. The historic woodland cabin of playwright Paul Green, author of *The Lost Colony* outdoor drama, symbolizes the inspiration that artists draw from nature. The cabin also illustrates the relationship of people, land, and plants in southern culture. Wise stewardship, communicated in all exhibits, is a special focus of a rare-plant garden that tells the stories of endangered species and the role that gardens can play in their survival.

The Unseen Garden

Promotion of Conservation through Propagation

For the past fifteen years, the North Carolina Botanical Garden has worked with the Garden Clubs of North Carolina, Inc., to promote use and conservation of wildflowers through the Wildflower of the Year program. Staff and volunteers carefully assemble more than 10,000 packets of seeds from a selected wildflower

species each year. The brochure accompanying each seed packet tells how to grow the wildflower. The Wildflower of the Year is distributed through garden clubs and schools and in response to mail requests.

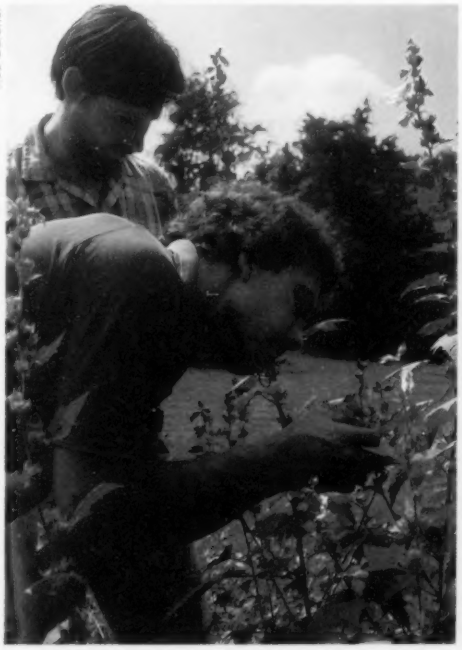
The Wildflower of the Year program is one example of the Garden's commitment to conservation through propagation. Teaching people to propagate plants helps preclude their collecting plants directly from wild populations and thus potentially decimating natural areas. The Garden also encourages gardeners to acquire plants from nurseries that are known to propagate the plants they sell, and it works to select promising native plants for the horticultural trade. Garden curators write articles for nursery growers and give talks promoting little-known native plants for propagation and use in the landscape. The popular book *Growing and Propagating Wild Flowers* (The University of North Carolina Press, 1985) reflects fifteen years of Garden staff experience with wildflowers.

Building on the pioneering efforts of the North Carolina Wildflower Preservation Society, the North Carolina Botanical Garden promotes the use of native wildflowers in other ways. Garden staff have worked with the North Carolina Department of Transportation's roadside wildflower program, advising state personnel on selecting beautiful flowers from local flora rather than introducing exotic species that are inappropriate here.

Lady Bird Johnson visited the Garden in 1988 and received the Flora Caroliniana Award for her work on wildflower conservation and highway beautification. After describing her appreciation of the flowering Texas landscape around her home, she complimented North Carolinians on the wildflowers she had seen along North Carolina roads and in the Garden. She expressed regret that horticulture was sometimes a force for homogeneity, the same plants being used over and over. One of her goals, she said, was "to keep Texas looking like Texas and North Carolina looking like North Carolina." North Carolina's native plants are a perfect antidote to horticultural homogenization.

Botanists hand-pollinate *Iliamna remota*, a rare species commonly known as Kankakee mallow. Such work is part of the Garden's involvement in the Center for Plant Conservation's effort to preserve endangered species.

Rob Gardner



Avoidance of Invasive Plant Pests

Gardeners like to think of themselves as inherently "green" or proenvironment, yet horticulture itself has been among the biggest problems in one area: the inadvertent release of pest organisms. One of the major threats that humans have posed to biodiversity is transport and dispersal of species across natural barriers. Examples are in the news every day: the gypsy moth (an insect that defoliates whole forests), zebra mussel (a troublesome invader of the Great Lakes that clogs water-intake systems and displaces native species), chestnut blight (which has eliminated a highly valuable tree that was a consistent supplier of food for wildlife), and dogwood anthracnose (a new disease that threatens the flowering dogwood). Although many newly introduced plants are beneficial, some species become serious pests in their new homes. These include water hyacinth, which clogs rivers and lakes in the southeastern United States; and kudzu, the Asian vine that can overtop trees, barns, and railroad stations. The Garden's work in promoting the use of native plant species helps avoid introduction of plants that crowd out native wildflowers and may harbor destructive insect, bacterial, or fungal pests. Further, the Garden is among the first gardens to conduct risk assessments of exotic species, to ensure that invasive pests are not spread. Its staff work with governments and the nursery industry to promote native and noninvasive plants for all possible horticultural and landscape use.

Building of a Noah's Ark for Plant Diversity and Restoration

The best conservation of plant diversity takes place in protected natural areas where plant populations thrive with their pollinators and seed dispersers in the environmental conditions to which they are adapted. However, sometimes this is not

Rob Gardner

Golden seal, a native wildflower rich in medicinal properties, is in jeopardy because of overcollection.

enough: the habitat may be threatened, or the population may have dwindled to a few individuals that no longer reproduce. About fifteen years ago, the Center for Plant Conservation, now housed at the Missouri Botanical Garden in St. Louis, began to draw together a nationwide organization of botanical gardens to hold what has become known as the National Collection of Endangered Species. One of the ten gardens originally linked by this project, the North Carolina Botanical Garden continues to have responsibility for parts of seven states. The project has grown to twenty-five gardens nationwide.

In some ways this Noah's Ark–like project faces a worse problem than Noah did: the need to protect not just two individuals of a species but a representative sample of genetic diversity, and to do so not for forty days of rain but for decades, until the plant is safe in the wild. Genetic diversity is the way that natural populations adjust to environmental change. It becomes a rich source of variation for traits useful to people as well.

Today the North Carolina Botanical Garden preserves thirty critically endangered species as a last resort against their extinction in the wild. It holds some as seeds in deep cold storage (many have an innate dormancy that allows storage for decades or more), others as living plants in the Garden. Horticulturists can use the collection to study the biology of the plants, in order to protect and manage them better in the wild and to restore their native populations and habitats.

As the humans of this era either protect or lose the last pristine areas, conservationists will increasingly turn to restoration of degraded lands. Gardens and gardeners have a large role to play in selecting and learning to propagate and care for the plants to be used.

Plant Rescue

Sometimes loss of wild populations becomes unavoidable. Damage occurs to both rare and common species. The Garden's Plant Rescue Program organizes volunteers and school groups to salvage and put to good use plants that will otherwise be lost. However, there are limits to the effectiveness of plant rescue: not all species survive when transplanted, and often much else is lost with development—the natural habitat and plant pollinators and dispersers.

Protection of Wild Gardens and Conservation of Natural Areas

The Garden protects several natural areas recognized by the state's Natural Heritage Program as the best of their kind in existence. The Mason Farm Biological Reserve, for example, is home to the Big Oak Woods, a 70-acre mature hardwood forest in a Piedmont swamp, and the Southern Shagbark Hickory Slope, an old-growth forest associated with the rocky soils. Along nearby Morgan Creek, north-facing bluffs on Garden lands support populations of the purple rhododendron, a mountain species that survives here from the cooler climates of the last ice age. The cool habitat also shelters salamanders and other inhabitants more commonly associated with mountain sites much farther to the west.

In addition, the Garden works with conservation groups, including the Piedmont's Triangle Land Conservancy and the statewide North Carolina Nature Conservancy, to protect natural areas throughout the state.

The Garden's collection of carnivorous plants intrigues visitors of all ages. These plants are among the specimens that the pioneer Visiting Plant program takes into area classrooms to enrich the school curriculum.

Sandra Brooks-Mathers

Botanical and Environmental Education

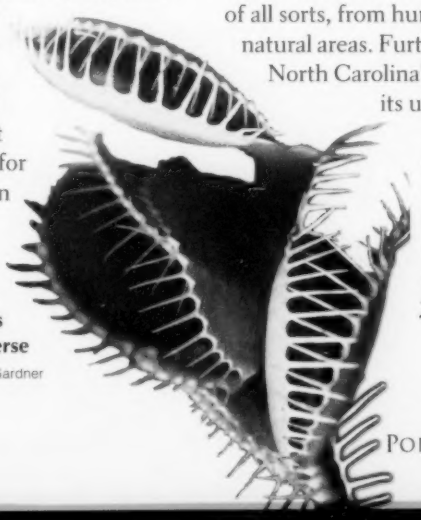
The Garden sponsors several programs that help schoolchildren and other visitors understand and appreciate the environment on which humans depend. In summer 1998 the Garden initiated a day camp in which young people learn about the intricacies of the natural world. Garden staff members and volunteers also work with teachers to develop special tours for school groups.

The Looking for Longleaf project engages students in the ecology of the Garden's Coastal Plain and Sandhills habitats through studies of (1) an important tree, the longleaf pine; (2) the ecology of the Coastal Plain, including habitats, plant and animal diversity, seasonal changes, and dynamics; and (3) the role of fire in the longleaf pine habitat. Human history also is part of the Looking for Longleaf story. The longleaf pine produced the naval stores industry and thus the tar that led to the nickname for the Revolutionary War (and later Civil War) troops that would not retreat, the Tar Heels.

The Visiting Plant program allows a living, potted plant to "visit" a fifth-grade classroom for up to two weeks. Students care for the plant and use related curriculum materials suggesting activities in a wide array of disciplines: math, science, history, literature, and art. A dozen different species of plants have visited North Carolina classrooms as part of this program in the past year.

Horticultural Therapy

"Horticultural therapy" is the use of horticultural activities to improve quality of life for a variety of special populations. Nursing homes, schools with programs for persons with disabilities, sheltered workshops, senior centers, rehabilitation centers, hospitals, mental health clinics, and even correctional centers use horticulture to aid in healing, motor skill improvement, and physical and emotional development. Staff members conduct training sessions and write guides for others who wish to become involved in horticultural therapy. *Growing with Gardening: A Twelve-Month Guide for Therapy, Recreation, and Education* (The University of North Carolina Press, 1988), written by Bibby Moore, is an example of staff activity of this kind.



The Venus flytrap, native only to an area within 100 miles of Wilmington, N.C., is one of many fascinating species that make up the state's rich and diverse plant kingdom. Ron Gardner

The Future

The North Carolina Botanical Garden has experienced great growth over the past decade. Its future plans call for a new home for The University of North Carolina Herbarium, a botanical library, and an education center. The proposed new building for the herbarium will contain up to two million specimens that document plant life in the southeastern United States and provide materials for future environmental studies and understanding of the region's changing ecosystems. A herbarium houses specimens that are the fundamental unit of all botanical knowledge, the basis of all scientific nomenclature and plant identification—specimens of trees, poisonous plants, weeds, medicinal plants, horticultural plants, and rare plants. Such collections are essential to identifying and tracking new agricultural weeds and in documenting locations of endangered species. The botanical library will feature horticultural and botanical books for gardeners and botanical scholars alike. The education center will welcome visitors and allow them to enter the collections, displays, and trails fully prepared.

Conclusion

The North Carolina Botanical Garden aspires to provide citizens with the information they need to enjoy and live in the plant kingdom, a kingdom that is rich in colors, forms, and uses. The Garden endeavors to help North Carolinians create a habitat that meets human needs now and in the future and includes gardens of all sorts, from human-controlled landscapes to wild natural areas. Further, the Garden seeks to celebrate North Carolina's colorful wildflowers and protect its unique plant diversity.

For more information about the Garden's programs and services, write to North Carolina Botanical Garden, Campus Box 3375, The University of North Carolina at Chapel Hill, Chapel Hill, NC 27599-3375.

Questions I'm Frequently Asked

Do Local Governments Have to Bid Computer Software Contracts?

Frayda S. Bluestein

Like many public and private entities, local governments in North Carolina increasingly depend on computers to conduct their business. Investments in information technology, including computer software, hardware, and related services, are costly and complicated. Rapid innovation and development of new products make it difficult for many local governments to maintain the expertise necessary to evaluate available products before investing in new systems. Local governments therefore must rely on independent consultants and suppliers of information technology products to help develop and evaluate computer systems that meet their needs.

Purchases of information technology range from simple acquisition of personal computers and prewritten software products available "off the shelf" to contracts for integrated systems involving programs designed to meet a particular need. Many purchases fall somewhere between these extremes, involving specialized software that already has been developed but must be "configured," or modified slightly, to fit the environment of each successive purchaser. Local government officials have inquired whether competitive bidding requirements apply to any or all of these contracts.

No North Carolina case has addressed that question. This article analyzes how a court might apply the bidding statutes to local government contracts for purchase of computer software, drawing analogies to similar inquiries under the sales tax law and the Uniform Commercial Code (UCC) and to cases from other states.[1] It concludes that a North Carolina court probably would rule that prewritten computer software delivered on a tangible medium is within the scope of North Carolina's competitive bidding statutes but a contract to design custom software is not. The article goes on to discuss several statutory exceptions to the bidding requirements that may apply to certain computer software contracts. Finally it describes some approaches to obtaining bids on computer software

The author is an Institute of Government faculty member who specializes in local government purchasing and contracting. An earlier version of this article was published as *Local Government Law Bulletin*, no. 86 (June 1998).

within the statutory framework. The article concludes that, although it is possible to purchase computer software using a competitive process that complies with North Carolina's legal requirements, that process may lack the flexibility required to obtain the best value at the best price to meet local governments' growing needs for information technology.

Interpretation of the Competitive Bidding Statutes

Local governments must obtain sealed, competitive bids for the purchase or lease-purchase of "apparatus, supplies, materials, or equipment" estimated to cost $30,000 or more.[2] They must receive informal bids for purchases costing from $5,000 to $30,000.[3] The first question to be addressed, then, is whether computer software falls within the scope of the statutes.

The North Carolina courts rarely have had occasion to interpret the scope of the competitive bidding laws over the sixty-five years since they were first enacted. The leading case is *Mullen v. Town of Louisburg*,[4] decided in 1945, in which the court faced the question of whether the bidding requirements applied to the purchase of electricity. The court held that they *did not* apply. The ruling turned on the fact that because of government regulation of electrical rates, the bidders were not able to name their price. In effect, there was no open market for competitive pricing, so conducting a competitive bidding process would have been futile.[5]

Although the *Mullen* case involved a narrow set of facts, the court discussed the meaning of the statute before reaching its holding. The terms "apparatus, materials, and equipment," the court observed, denoted particular types of *tangible personal property*. Although the term "supplies" might be open to broader definition, the court chose to confine the meaning to property of "like kind and nature," given the term's use in conjunction with the other three terms.[6]

On the basis of the *Mullen* case, then, computer software is subject to competitive bidding if it is characterized as, or considered to be, tangible personal property. Certainly most software has a tangible, physical form—from the off-the-shelf variety that one can buy in a box, to the customized form that a vendor may install directly as part of a larger, multifaceted computer system. On the other hand, computer software contracts often include a service component, and computer software also represents intangible forms of property.

Computer Software as a Service

North Carolina's competitive bidding laws apply to tangible personal property but *not* to service contracts. There is no exception in the laws for service contracts; they simply do not fall within any of the categories of contracts listed in the statutes.[7]

There are two theories under which computer software contracts could be characterized as services and thus not subject to bidding. Under one analysis the software itself could be considered a service as opposed to a tangible good. Also, it could be argued that the bidding laws do not apply to contracts that involve a service component in addition to the software.

Software as a Service

No North Carolina case has addressed the issue of whether software is considered tangible property or a service in the bidding context. The state's sales tax law, however, defines "computer software" as tangible personal property that is subject to taxation. The definition of "tangible personal property" includes "computer software delivered on a storage medium, such as a cd-rom, a disk, or a tape."[8] The statute contains an exemption, however, for "custom computer software," which is software "written in accordance with the specifications of a specific customer."[9] The statute further qualifies the definition by specifying that custom computer software does not include "prewritten software that can be installed and executed with no changes to the software's source code other than changes made to configure the hardware or software."[10]

These definitions appear to be aimed at distinguishing computer software transactions in which the service of designing a custom program predominates, from those in which the product already has been developed and is commercially available. Although significant personal effort goes into the development of many computer software products, once a product is available in a tangible form, it is no longer characterized as a service. In the case of prewritten software requiring configuration, the tax code implies that the amount of personal service involved is incidental.[11]

The same distinction appears in court rulings addressing whether computer contracts are subject to Article 2 of the UCC, which applies only to transactions in "goods."[12] One court, concluding that

computer software should be characterized as goods under the UCC, analyzed the issue this way:

> Computer programs are the product of an intellectual process, but once implanted in a medium are widely distributed to computer owners. An analogy can be drawn to a compact disc recording of an orchestral rendition. The music is produced by the artistry of musicians and in itself is not a "good," but when transferred to a laser-readable disc becomes a readily merchantable commodity. Similarly, when a professor delivers a lecture, it is not a good, but, when transcribed as a book, it becomes a good.[13]

A majority of courts considering the issue have held that transactions involving prewritten computer software constitute sales of goods and are within the scope of the UCC.[14] Later this article discusses a proposal to revise the UCC, prompted by concerns about treating computer software contracts and licenses like sales of other goods (see "Computer Software as Intangible Property or License," page 31). Despite many questions about what rights accompany software licenses, however, courts generally have held that prewritten software represents a tangible product.

Although the sales tax law and the UCC are separate from the competitive bidding laws and exist for different purposes, all three sets of laws apply to tangible personal property. A court might draw on the definitions in the sales tax law and rulings under the UCC to conclude that previously developed computer software is tangible personal property and is subject to the bidding requirements whereas a contract to develop custom computer software is a service and not within the scope of the bidding statutes.

Contracts Combining Tangible Property and Services

Many local government contracts involve the purchase of both tangible personal property and one or more services. For example, the purchase of equipment may include installation or maintenance. Computer software contracts often involve similar combinations of tangible products and services. In each of these situations, to determine whether bidding is required, it is necessary to determine which aspect of the contract is predominant or more significant.[15]

North Carolina courts have recognized in contexts other than computer software that the predominance of a service component is significant in determining whether competitive bidding is required.[16] Courts also have used this analysis in determining whether contracts involving both goods and services are subject to the UCC.[17] To determine what aspect of a contract is predominant, a court may consider whether the bulk of the cost is for the service or for the tangible goods. An alternative approach is to consider whether the primary benefit to the contracting unit derives from the knowledge and the expertise of individuals or whether their contribution is incidental.

Although no North Carolina court has addressed this issue in a case involving bidding of computer software, courts in other states have. A series of cases from New York illustrates how courts in that state have analyzed whether a computer software purchase involves primarily services or products. New York bidding law contains an exception for purchasing services "which require scientific knowledge, skill, expertise and experience."[18] A New York court applied this exception when

> [b]oth the RFP [request for proposals] and the undisputed facts contained in the record establish that, rather than a group of physical articles of electronic hardware, [the governmental agency] primarily was seeking the design of a computer system which would provide prompt, efficient, cost-effective computer services to satisfy its growing and increasingly complex needs for the next five years. Such a design required the employment of the highest skills in the field of computer science. Vendors were allowed considerable discretion in the RFP in proposing the hardware and software components of the system, and they were also encouraged by [agency] officials to be innovative and flexible in meeting the required specifications in their design proposals.[19]

The court reasoned that the agency clearly was seeking the *design* of a computer system to meet its specific needs. Another court had reached similar results in two earlier cases, one involving a computer-data-control system for off-track betting[20] and one involving a security system and service.[21] The service exception applied because the contract involved "inextricable integration of scientific and technical skills used in conjunction with electronic hardware and software."[22]

In another New York case, however, the court found that a computer system contract did not involve a substantial service component and did not fall within the service exception to bidding. The court based its decision on these facts:

> [T]he City *knew* the specific type of computer equipment it needed to meet its needs[,] . . . had conducted its own study of its computer needs and hired an independent consultant to perform a capacity study. . . . The proposers had little discretion under the RFP in selecting the hardware or software. The RFP did not

invite innovative design proposals for a computer system. The only services which the RFP called for were installation and maintenance, services which accompany many machine purchases.[23]

North Carolina courts might use a similar analysis in determining whether particular contracts involve services predominantly, or services inextricably involved in the total system being purchased, versus services incidental to the purchase. In the New York cases, the court seemed to be influenced by the amount of discretion that the bidders had in preparing their proposals. In addition, the court weighed heavily the extent to which the city would need to exercise discretion in choosing among the proposals, because the New York bidding statute, if it applied, allowed consideration of price only. As noted later, North Carolina's bidding laws allow consideration of factors in addition to price, so that issue might be less important if a case arose in this state. Furthermore, a court might conclude that the bidding laws apply even when the bidders have significant discretion in developing their bids, on the theory that the bulk of the expense consists of the hardware and the software.[24]

Local governments might urge the North Carolina courts to adopt the reasoning in the *Burroughs* case, described earlier, that when a local government relies on a vendor to design a computer system to meet its needs, the design services provided by the vendor predominate. In such a case, the argument might run, the court should treat the transaction as a service whether or not the cost of the hardware and the software represents the bulk of the expense. This argument has practical significance because the designer/vendor of an integrated computer system may not guarantee that the desired performance will be achieved if the computer hardware and software are purchased from and installed by different suppliers. Without further interpretation or clarification from the North Carolina courts, however, local governments run the risk of a challenge if they fail to use competitive bidding in these situations.

Computer Software as Intangible Property or License

As noted earlier, computer software not only has a tangible form but also consists of intangible property interests. The unique design of each computer software program (including everything from the source code to the graphic display that appears on the screen) is recognized as "intellectual property"—a form of intangible property that is protected by copyright and trade secret laws. To maintain this protection, computer software companies sell their products under a *license*, which usually limits the use of the products to the actual purchasers and restricts the products' resale, reproduction, or alteration.

. . . assume that computer software contracts are subject to the competitive bidding requirements unless the contracts are for custom software. . . .

Some have argued that the interest obtained under a computer software license is sufficiently limited that it is more like a lease than a purchase and, as such, should not be considered to be within the scope of the bidding statutes. (Because the bidding laws explicitly refer to "purchases," they are generally understood not to apply to lease contracts.Thus a lease of computer software, as opposed to a purchase of it, is not subject to the bidding laws. A lease with an option to purchase, however, is subject to the competitive bidding requirements.)[25]

In cases arising under the UCC, courts have struggled to develop a consistent body of law on the threshold question of whether a software license is a contract for the sale of goods. Although some cases hold that a license is simply not a sale,[26] courts in other cases have concluded that computer software licenses can represent the conveyance of a tangible product, despite the restrictions on the use of the product imposed under the license and the copyright laws. As one court has noted, "We treat licenses as ordinary contracts accompanying the sale of products, and therefore as governed by the common law of contracts and the Uniform Commercial Code."[27]

To make matters even more complicated, courts are not bound by parties' characterization of a transaction as either a lease, a sale, or a license. Instead, courts evaluate the actual character of the transaction. Thus a court may conclude that a contract involves a sale, even when the transaction is called a lease or a license, if it appears to give the buyer ownership of a copy:[28] "If a transaction involves a single payment giving the buyer an unlimited period in which it has a right to possession, the transaction is a sale. In this situation, the buyer owns the copy regardless of the

label the parties use for the contract."[29] Many computer software contracts, then, may involve the sale of an object embodying work that is protected by copyright, or they may involve a license for limited use of protected material but no ownership of any tangible product.

Concerns about inconsistent court rulings on the characterization of computer software contracts, and about the consequence of applying the UCC to these unique transactions, have prompted a proposed revision to the UCC. A new Article 2B would establish separate rules for software contracts (whether or not they are characterized as licenses) and licenses of information. The commentary to a recent draft of the new article notes as follows:

> [These] transactions whether licenses or sales are subject to either express or implied limitations on the use, distribution, modification and copying of the software. These limitations are commercially important because (unlike . . . newspapers and books) the technology makes copying, modification and other uses easy to achieve and essential to even permitted uses of the software. . . . [A]s a relatively new form of information transaction involving products with distinctive and unique characteristics, no common law exists on many of the important questions with reference to publisher and end user contracts regardless of whether a transaction constitutes a license or sale of a copy.[30]

It is unclear whether the unique aspects of computer software contracts that evoked the proposed revision to the UCC would influence a court's analysis of whether computer software is subject to bidding. The UCC addresses issues of contract formation and rights of the parties under the contract once it has been formed. The competitive bidding laws are designed to promote fairness and competition in public contracting and to conserve public funds.[31] The limitations that a seller places on the use of computer software may not bear on the policies promoted by bidding. As noted in the conclusion to this article, however, the unique aspects of computer software transactions suggest a need for more flexibility in the competitive process.

Until changes in the law are actually enacted, most courts will recognize that a transfer of tangible property can occur even when it is accompanied by or characterized as a license. *Local governments should assume that computer software contracts are subject to the competitive bidding requirements unless the contracts are for custom software design or development.* Before submitting a computer software contract to bidding, however, local governments should examine whether any of the statutory exceptions to bidding apply.

Exceptions to Bidding: Sole Sources and Piggybacking

Two relatively new exceptions in the competitive bidding laws may apply to certain computer software purchases: sole sources and piggybacking.

Sole Sources

The sole-source exception contained in G.S. 143-129(f) applies to purchases when "performance or price competition is not available; when a needed product is available from only one source of supply; or when standardization or compatibility is the overriding consideration." Purchases made under this exception must be approved by the governing board. The sole-source exception is fairly broad and may apply to several common computer software purchasing situations.

Purchase of upgrades to existing computer programs often will be within the scope of the sole-source exception. Usually the upgrade will be available only from the company that produced the original system. However, even if a government needs a particular make or brand, there may be more than one supplier, and in such a case the sole-source exception does not apply. For example, upgrades to products produced by Microsoft are available from numerous retail sources. Many software programs commonly used by local governments, however, are designed for specific functions unique to their operations (tax collection, financial accounting, geographic information systems, and so forth). Once a local government chooses to purchase and install a particular system, upgrades and modifications to that system are generally available only from the original provider or its successor. In these cases the sole-source exception applies.

The sole-source exception also may apply to the initial purchase of computer software. Some computer software needs may be met by only one supplier. Applying the sole-source exception to the purchase of a new computer program is more troublesome than applying it to an upgrade, however. For example, local government officials want to purchase a new software system to handle finance and purchasing operations, including accounts payable, encumbrance accounting, issuance of purchase orders, and related functions. Numerous computer programs can

complete these tasks, but they vary in the way they do it, in the types of equipment they require—indeed, in hundreds of ways, depending on the detail of the comparison. On some level, each system is unique, and each may be available from only one source. The local government officials decide that one particular system best meets their needs. Would this purchase fall within the sole-source exception?

Using the sole-source exception in the situation just described probably is not appropriate. As a general rule, if the market offers multiple products that address a particular local government's need, the unit should seek competitive bids. Many local government officials would rather not conduct a competitive process once they have identified a product that best meets their needs. They may be concerned that once they receive bids, they will have to purchase the lowest-priced product, or they may prefer negotiating with a single provider—an option not available under the bidding laws. As discussed later, however, although the competitive bidding process lacks flexibility and does not permit negotiation, it does allow local governments to purchase the best, as opposed to the lowest-priced, computer software for their particular needs.

A difficult issue in using the sole-source exception to purchase computer software arises when the contract includes both hardware and software. In most cases, even if the software is available from only one source, the hardware is available from multiple sources. The software vendor may require, or the local government desire, that the software be delivered installed on the hardware. In some cases a vendor may refuse to honor the warranty on the software if it is installed on hardware that is purchased separately. Application of the predominant-aspect rule described earlier suggests that if the hardware represents a substantial proportion of the total cost, the local government should divide the contract and separately seek bids on the hardware, or it should let the entire contract for bidding, even though the software is available from only one source. This common problem simply does not have a clear or practical solution under the competitive bidding laws as currently written.

Piggybacking

Another exception to the bidding requirements allows local governments to purchase from a contractor who has previously contracted with another public agency. Often referred to as the "piggybacking" exception, G.S. 143-129(g) provides that a local government may purchase an item without submitting the purchase to competitive bidding if another public agency (any local or state government in the country, or any federal agency) contracted to purchase the item within the previous twelve months and if the contractor is willing to sell the same product at the same price. The statute requires that the previous agency have entered into the original contract following a public-bidding procedure similar to that required of local governments in North Carolina. The statute also requires that the governing body approve the contract at a regular meeting after ten days' public notice. No action is required of the agency that issued the original contract.[32]

Although North Carolina bidding statutes allow consideration of quality, performance, and time, the lack of flexibility to tailor proposals after receiving bids may limit local governments' ability to obtain the best proposal.

Under this exception a local government may purchase computer software that another public agency has purchased without repeating the competitive bidding process as long as the prior contract is less than twelve months old. This time limitation may reflect a concern that after twelve months the prices or the competition available in the market may be sufficiently different that a new bidding process should be conducted.

A subtle limitation on the use of this exception arises if the local government wishes to modify the product purchased under the prior contract. For example, a public agency has purchased a computer system. A North Carolina local government desires to purchase that system under the piggybacking exception, but the vendor must modify it to suit the local government's needs. The purchase may violate the requirement that it be the same product that was purchased by the other agency. It is impossible to identify what specific types of changes would be deemed so significant that the purchase would no longer represent the same product previously purchased. If necessary adaptations would result in more than a nominal price increase, it might not be safe to assume that use of the exception would be upheld if challenged.[33]

Bidding of Computer Software Purchases

Computer software purchases that do not fall within an exception and do not constitute service contracts are subject to the competitive bidding requirements. This means that if the local government estimates the contract to cost $30,000 or more, it must place an advertisement in a newspaper of general circulation in the area. The advertisement must identify when and where the bids will be opened, describe when and where interested bidders can obtain specifications, and state that the governing board reserves the right to reject any and all bids. The statutes require bid and performance bonds, but these may be waived by the governing board or by the manager or purchasing officer to whom waiver authority has been delegated.[34] A waiver of bonds should occur before bids are received, and the specifications should clearly indicate whether or not bonds are required. The statutes also require that bids be awarded to the "lowest responsible bidder, taking into consideration quality, performance, and the time specified in the proposals for the performance of the contract."[35] No minimum number of bids must be obtained unless a local policy requires it.[36]

For contracts in the informal range ($5,000–$30,000), the statutes simply require that the local unit obtain bids.[37] No advertisement is required, and, again, no minimum number of bids must be obtained unless a local policy requires doing so. Nonetheless, the local government should contact at least two potential suppliers to obtain quotes because it would be difficult to argue that "bids" were sought if only one supplier was solicited. As noted earlier, if only one supplier is available, the sole-source exception may apply.[38] The standard for awarding informal contracts is the same as that for awarding formal contracts.

Use of Requests for Proposals (RFPs) in Computer Software Purchases

Despite the fact that most computer software contracts involve tangible personal property, seeking bids on computer software purchases is not like seeking bids on purchases of vehicles or office supplies. The main difference is that in many cases it is difficult, if not impossible, to prepare detailed specifications of the product to be purchased. This difficulty is not unique to computer software purchases, however, and there are approaches to specification writing that can be used to invite competition even when the details of the product are not known or when various types of products will meet the unit's need.

A commonly used approach to purchasing computer software or computer systems is a request for proposals, or RFP. Although the North Carolina bidding laws do not use the term RFP, the procedure is commonly used by other jurisdictions, and by North Carolina local governments for procuring services, which are not subject to competitive bidding requirements. An RFP usually contains a "performance" specification, which describes a desired function or outcome without specifying in detail how a vendor is to accomplish it. This process relies on the vendor's expertise, and the vendor's proposal sets out the method and the supplies necessary to perform the desired function or service. A request or an invitation for bids (RFB or IFB), on the other hand, is generally understood to be the solicitation document used in a sealed-bid procedure. An IFB typically contains detailed specifications of the item to be purchased, and bids that do not offer the item as specified must be rejected as nonresponsive. North Carolina local governments usually use this type of specification in a formal-bidding procedure.

No North Carolina case has addressed the question of whether local governments may use an RFP format with a performance specification and still comply with state bidding requirements. But cases from other states, discussed in the following paragraphs, suggest that they can. Also, the formal-bidding statutes do not limit the local unit's discretion in preparing specifications, nor do they specify the type of solicitation the unit must use. The local government must advertise and receive sealed bids at a public bid opening, but the sealed bids can be in any format designed by the local unit, as long as the specifications do not unjustifiably restrict competition.[39]

The main concern with using an RFP in formal bidding stems from the difficulty in comparing and evaluating the proposals. Unlike most formal bids, proposals for computer systems can be quite voluminous and often contain a wide range of options. When bidders submit proposals with varying approaches, it may be difficult to evaluate whether the bids are responsive (that is, whether they meet specifications)[40] and to determine which is the "lowest responsible bidder." In one case a Massachusetts court held that the use of "problem-oriented specifications" instead of definite specifications did not satisfy the applicable bidding statute.[41] On the other hand, courts in several

cases from other jurisdictions have upheld this approach, as well as the local government's discretion in selecting the best overall proposal even if it was not the lowest-priced offer.[42]

In a case arising in Georgia, a state whose legal standard for awarding contracts is similar to North Carolina's, the court upheld the use of an RFP process to purchase a computer system under the bidding statute. The court affirmed that the law allows the local government to compare proposals that vary in approach and to select the approach that best meets its needs:

> No Georgia case has held against the proposition that the lowest responsible bidder may be passed over if it is determined that a higher bidder has a decidedly better product given the specifications. . . . The county retains some discretion to consider its needs in evaluating the bids.[43]

This case is consistent with North Carolina precedent holding that the statutes do not always require awarding the contract to the lowest-dollar bidder.[44]

Lack of Flexibility in the Bidding Process

The previous discussion demonstrates that it is technically possible and legally permissible to insert some flexibility into the formal-bidding process using performance specifications and allowing a wide range of proposals as bids. A typical RFP process, however, contains elements that are *not permitted* under the formal-bidding statutes. In these respects the bidding laws lack flexibility and may hinder the local government in obtaining the best computer systems at the best price.[45]

After receiving RFPs, the parties might wish to negotiate and then modify the proposal so that it would more completely meet the needs of the unit. In some cases these modifications would change the price originally offered in the bid. Although not specifically prohibited in the bidding statutes, this type of negotiation is inconsistent with the basic tenets of competitive, sealed bidding. Under a sealed-bid process, the bidders are required to submit a complete proposal, and material modifications to bids (especially to bid prices) or deviations from specifications could be challenged as unfair to other competitors.

The legal concern with fairness under competitive bidding laws makes sense, and it can readily be applied when the IFB contains detailed specifications and when the bidders offer similar products. However, when products offered vary significantly from one another (for example, when vendors take different approaches in response to a performance specification), it is more difficult to apply a legal standard designed to establish a level playing field. In these situations, after the local government has determined through competition which proposal offers the most desirable approach, tailoring of the preferred product may not do injustice to the competitive process. Nonetheless, current law does not allow the local government to make any material modification to a proposal after its submission and before the award of a contract.

Recognizing the need for flexibility in purchasing computer software, the Legislative Research Commission's Committee on Information Technology has recommended legislation that would allow state agencies to use a "best value" procurement method for contracts involving the purchase of information technology.[46] At the time of this writing, the proposed legislation (H.B. 1357) does not apply to local governments. The best-value procurement method specifically authorizes consideration of multiple factors in awarding information technology contracts, including the total cost of acquiring, operating, maintaining, and supporting the product over its projected lifetime; the technical merit of the vendor's proposal; the vendor's past performance; and the likelihood that the vendor can perform the requirements stated in the solicitation on time, with high quality, and in a manner that accomplishes the stated business objectives.[47] Information technology is defined in the proposed legislation to include "electronic data processing and telecommunications goods and services, microelectronics, software, information processing, office systems," and related consulting and design services.[48]

The committee's proposed legislation also authorizes a "solution-based solicitation" method for procurements of highly complex information technology. This is similar to the performance specification approach discussed earlier.

In support of its recommendation, the committee notes as follows:

> Information technology is more complex, more volatile, and often considerably more expensive than most commodities purchased by the State, and therefore should be acquired differently. In many cases State agencies seek a technology solution to a business problem, but are unsure of exactly what that technology solution might be. In such cases it is not appropriate to use the traditional means of selecting

> contractors, whereby the requirement is expressed in terms of detailed technical specifications and the lowest bid which meets specifications receives the award. It is more appropriate to evaluate vendors' proposals and select a contractor on the basis of "best value," meaning the best tradeoff between price and performance, where quality is considered an integral performance factor.[49]

The report notes that the existing competitive bidding laws applicable to state agencies do not prohibit consideration of factors in addition to price. (As noted earlier, the legal standard that applies to local governments similarly allows consideration of factors in addition to price.) The committee found, however, that the technique often is not used in situations when it might be. The need for expertise in employing the best-value procurement method prompted the committee to call for training in addition to specific legislative authority.[50]

Other public agencies already have established more flexible competitive procedures for procurement of information technology.[51] Charlotte obtained local legislation in 1993 to exempt the city from competitive bidding for the purchase of telecommunication, data-processing, and data-communication equipment, supplies, and services. The local act created a new provision in the city's charter authorizing the city to use a flexible competitive process for these purchases that includes the option to negotiate.[52] Tennessee has enacted a statute authorizing the use of a two-step sealed-bidding procedure.[53] The procedure calls for prices and technical information to be submitted and evaluated separately. The Tennessee statute allows the state to obtain additional information from bidders to facilitate evaluation of technical proposals, and it appears to allow adjustment of both technical and price bids if necessary to meet performance requirements.

A similar type of flexibility is provided in the Model Procurement Code for state and local governments, developed by the American Bar Association. The code, which has not been adopted in North Carolina, allows for a procedure called "competitive sealed proposals," combining a sealed, competitive process with the flexibility of an RFP process.[54] The competitive sealed-proposal process allows discussions for clarification after proposals have been opened and allows changes in proposals. Precautions must be taken under this procedure to treat the offerors fairly and to ensure that information gleaned from competing proposals is not disclosed to the other offerors.[55]

These modified competitive procedures provide the flexibility that seems particularly important to develop computer software contracts that are both cost-effective and responsive to the specific needs of the governmental agency. Although the North Carolina bidding statutes allow—indeed require—consideration of quality, performance, and time, the lack of flexibility for local governments to tailor proposals after they receive bids may limit the local governments' ability to obtain the best proposal. Further, it may tempt units to avoid seeking competition altogether, even when avoidance is not clearly authorized.

Notes

1. The Uniform Commercial Code is a set of uniform laws that have been enacted in substantially the same form in every state. The laws are designed to modernize the law of commercial transactions and to provide uniformity and continuity of basic legal issues involved in commercial transactions in order to facilitate interstate commerce. In North Carolina the UCC can be found in Chapter 25 of the General Statutes.

2. N.C. Gen. Stat. [hereinafter G.S.] § 143-129.

3. G.S. 143-131.

4. Mullen v. Town of Louisburg, 225 N.C. 53, 33 S.E.2d 484 (1945).

5. In light of the impending deregulation of the electrical supply industry, this case no longer may be a reliable statement of the application of the bidding requirements to the purchase of electricity.

6. *Mullen*, 225 N.C. at 58, 33 S.E.2d at 487.

7. Construction or repair services are covered by the bidding laws, and contracts for architectural, engineering, or surveying work are subject to the procedures in G.S. 143-64.31, -64.32.

8. G.S. 105-164.3(20).

9. G.S. 105-164.13(45).

10. G.S. 105-164.13(45).

11. *See* International Business Mach. Corp. v. Director of Revenue, State of Missouri, 765 S.W.2d 611, 612 (1989) (holding that computer software was subject to sales tax and was neither a service nor customized because modifications from product available in catalog were minimal).

12. G.S. 25-2-102, -2-105.

13. Advent Sys. Ltd. v. Unisys Corp., 925 F.2d 670, 675 (3d Cir. 1991) (holding that computer software contract involved sale of "goods" and was covered by UCC). *See also* Architectronics v. Control Sys., 935 F. Supp. 425, 431, n.5 (S.D.N.Y. 1996) (holding that agreement to write software was not subject to UCC).

14. *See* Andrew Rodau, "Computer Software: Does Article 2 of the Uniform Commercial Code Apply?" *Emory Law Journal* 35 (1986): 853; NMP Corp. v. Parametric Technology, 958 F. Supp. 1536, 1542 (N.D. Okla. 1997).

15. For further discussion of the "predominant aspect" rule for interpreting the competitive bidding statutes, *see* Frayda S. Bluestein, *A Legal Guide to Purchasing for North Carolina Local Governments* (Chapel Hill, N.C.: Institute of Government, The University of North Carolina at Chapel Hill, forthcoming 1998), 22–23.

16. *See* Plant Food Co. v. Charlotte, 214, 22–23 N.C. 518, 522, 199 S.E. 712, 715 (1938) (holding that contract for removal of sludge from waste treatment system was service contract rather than sale of city property).

17. Batiste v. American Home Prod. Corp., 32 N.C. App. 1, 6, 231 S.E.2d 269, 272, *disc. rev. denied*, 292 N.C. 466, 233 S.E.2d 921 (1977).

18. Pacificorp Capital v. New York City, 741 F. Supp. 481, 485 (S.D.N.Y. 1990).

19. Burroughs Corp. v. New York State Higher Educ. Serv. Corp., 458 N.Y.S.2d 702, 704 (N.Y. App. Div. 1983).

20. American Totalisator Co. v. Western Regional Off-Track Betting Corp., 396 N.Y.S.2d 301 (N.Y. App. Div. 1974). *See also* Autotote Ltd. v. New Jersey Sports and Exposition Auth., 427 A.2d 55 (N.J. 1981) (holding that service exception applied to contract for computer system for racetrack involving complex computer network designed to tabulate and categorize bets and to calculate payoffs for each race, including staff of technicians, operators, and on-call engineers).

21. Doyle Alarm Co. v. Reville, 410 N.Y.S.2d 466 (N.Y. App. Div. 1978).

22. *American Totalisator*, 396 N.Y.S.2d at 302.

23. *Pacificorp*, 741 F. Supp. at 485.

24. *See* Neilson Business Equip. Center v. Monteleone, 524 A.2d 1172, 1174 (Del. 1987) (holding that turnkey purchase of computer system in which hardware and software were combined before sale and then installed was predominantly sale of goods, and UCC applied).

25. G.S. 160A-19.

26. *See* Microsoft Corp. v. Harmony Computers & Elec., 846 F. Supp. 208, 212 (E.D.N.Y. 1994).

27. *See* ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1450 (7th Cir. 1996) (enforcing terms of shrink-wrap license under UCC).

28. *See* Applied Info. Management v. Icart, 976 F. Supp. 149, 154 (E.D.N.Y. 1997) [citing Raymond Nimmer, *The Law of Computer Technology* (Boston: Warren, Gorham, and Lamont, 1992), sec. 1.18(1), p. 1-103].

29. *Applied Info. Management*, 976 F. Supp. at 154. Determining whether the buyer owns a copy is significant for application of the "first sale" doctrine of copyright law and for determination of the uses the buyer can make of the product without infringing on the intellectual property rights of the seller or the licenser. *See* 17 U.S.C. §§ 117, 109 (1996 & Supp. 1998).

30. Henry Beck, "Uniform Commercial Code Article 2B—Licenses," National Conference of Commissioners on Uniform State Laws, Jan. 20, 1997 Draft, pp. 54–55, in Practicing Law Institute, *Patents, Copyrights, Trademarks, and Literary Property*, 478 PLI/Pat 103.

31. *Mullen*, 225 N.C. at 58–59, 33 S.E.2d at 487.

32. For a sample notice and answers to commonly asked questions about the piggybacking exception, *see* Frayda S. Bluestein, "Interpretations of the 'Piggybacking' Exception to North Carolina's Formal Bidding Requirements," *Local Government Law Bulletin*, no. 85 (June 1998); available on the Internet at http://ncinfo.log.unc.edu/purchase/piggy.htm.

33. The statute does allow the contractor to provide the product at a more favorable price or on more favorable terms.

34. G.S. 143-129(c), (a).

35. G.S. 143-129(b). For a more detailed discussion of the formal-bidding requirements, *see* Bluestein, *A Legal Guide*.

36. The three-bid requirement in state law (G.S. 143-132) applies only to construction or repair contracts. Some local governments may have policies requiring three bids for purchase contracts.

37. G.S. 143-131.

38. Public officials have observed that applying the sole-source exception to an informal bid may be more cumbersome than seeking bids because the exception requires approval by the governing board, which is not otherwise necessary for contracts in the informal range. For informal contracts it may be sufficient to seek competition and, if none is available, simply to document the efforts and explain the lack of competition, rather than proceed under the sole-source exception.

39. Sperry Corp. v. Patterson, 73 N.C. App. 123, 124, 135 S.E.2d 642, 644 (1985).

40. For a case discussing the legal standard for evaluating "responsiveness," *see* Professional Food Serv. Management v. North Carolina Dep't of Admin., 109 N.C. App. 265, 426 S.E.2d 447 (1993).

41. Datatrol, Inc. v. State Purchase Agent et al., 400 N.E.2d 1218 (Mass. 1980).

42. Burroughs Corp. v. Division of Purchase and Property, 446 A.2d 533 (N.J. Super. 1981); Municipal Leasing Corp. v. Fulton County, Georgia, 835 F.2d 786, *aff'd*, 849 F.2d 516 (11th Cir. 1988).

43. *Municipal Leasing Corp.*, 835 F.2d at 789–90.

44. Kinsey Contracting Co. v. City of Fayetteville, 106 N.C. App. 383, 416 S.E.2d 607, *pet. for disc. review denied*, 332 N.C. 345, 421 S.E.2d 149 (1992).

45. *See generally* Margaret E. McConnell, "The Process of Procuring Information Technology," *Public Contracting Law Journal* 25 (1996): 379.

46. Legislative Research Commission, Information Technology Committee, *Interim Report to the 1998 Session of the 1997 General Assembly* [hereinafter *IT Report*], Raleigh, N.C., May 11, 1998, p. 14.

47. *IT Report*, app. D, p. D-1.

48. *IT Report*, app. D, p. D-1.

49. *IT Report*, p. 14.

50. *IT Report*, pp. 14–15.

51. *See* McConnell, "Procuring Information Technology," 385–89.

52. *See* Charter of the City of Charlotte, subch. E, § 9.85 (1993 N.C. Sess. Laws ch. 196).

53. TENN. CODE ANN. § 12-3-203(a) (1992).

54. Model Procurement Code for State and Local Governments [hereinafter MPC] § 3-203 (Am. Bar Ass'n 1979).

55. MPC, Commentary to § 3-203, at p. 22.

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Book Reviews

Hazardous Waste Goes to Hollywood

A Civil Action, by Jonathan Harr. Vintage Books, 1995. 500 pp. $28.00 hardback. $13.00 paperback.

Richard Whisnant

Jonathan Harr has written a rare book: a work of nonfiction about a complex legal topic, which is engaging, provocative, a bestseller, and soon to be a major motion picture. *A Civil Action* is both hard to put down and hard to forget. The book and its author earned the National Book Critics Circle Award in 1995. On the eve of its release as a movie, *A Civil Action* provokes questions about hazardous waste, water supply contamination, cancer caused by the environment, and the ability of the legal system to respond to each of these concerns.

The Case and the Characters

Harr's protagonist, Jan Schlictmann, is a plaintiff's lawyer in Boston. In search of "getting rich while doing good," Schlictmann represents seven families from Woburn, Massachusetts, who have lost children or other family members to leukemia. For nine years, from 1980 to 1989, Schlictmann leads the Woburn plaintiffs in battle against two Fortune 500 companies whose dumping of hazardous waste allegedly caused the children's disease and ultimate death.

As the case unfolds through Harr's supple prose, Schlictmann is transformed from a paradigm of successful plaintiff's lawyer—driving Porsches and dressing in custom-tailored suits—to a character portrayed as a pitiful, irresponsible, greedy tort attorney who is in emotional breakdown and personal bankruptcy. The plaintiffs recover some money but get little satisfaction from their settlement. The companies admit no wrongdoing, despite apparently ample proof of dumping and perjury. At the end of the case and the book, Schlictmann, the plaintiffs, and the reader are left wondering about the American legal system's handling of "toxic tort" cases (the name used in legal circles for cases involving alleged injuries from exposure to toxic substances). In Harr's portrayal, nine years of investigations, abundant discovery, a multitude of motions and hearings, a trial, and millions of dollars in litigation costs fail to bring much closure to the issues in Woburn. This makes it all the more remarkable that the book is so compelling to read and has drawn such interest from Hollywood.

Along the tortuous path to Woburn's inner circle of litigation hell, Harr paints vivid, novelistic pictures of characters and courtroom scenes. There is Facher, the wizened senior litigator and archetypal Bostonian penny-pincher who represents Beatrice Foods, one of the defendants. Facher teaches trial advocacy on the side at his alma mater, Harvard Law School, where he grills students into tearful submission. "Behind Facher's thick glasses, his eyes were heavily lidded, as if he were on the verge of dozing. During class and in the courtroom, he often pursed his lips in a skeptical and disapproving manner, like a candystore proprietor guarding the goods against young hooligans."[1] Late at night, in the large Boston law firm where he presides over eighty litigators, Facher sits in dark storage

rooms thinking about his cases and worrying about his cats, his only companions since his divorce. He used to practice his cross-examinations on his wife. "'I can't prove it,' he once mused, 'but I bet trial lawyers have more marital problems than any other type of lawyer.'"[2]

Judge Walter Jay Skinner, another graduate of Harvard Law School, presides over the Woburn trial. He is a man "of great rectitude and decorum."[3] He refers to his wife as "Mrs. Skinner" and sentences lawyers to take classes on trial practice for filing poorly researched and written briefs. He walks "with his knees bent, his back bowed deeply forward at the waist, his head craned upward to see where he [is] going, like a man carrying a heavy but invisible load."[4] Judge Skinner seems to have strong opinions about the Woburn case and, to the chagrin of Schlictmann and the other lawyers for the plaintiffs, even stronger respect for Facher, whom he has known since law school.

Anne Anderson, the lead plaintiff, receives a strong characterization early in the book. In the first fifteen pages, she learns that her son Jimmy has leukemia. Harr paints a compassionate portrait of the Andersons and their son's illness and ultimate death. But like the rest of the plaintiffs, Anne Anderson fades out of focus as the narrative moves on. The book becomes the book of Schlictmann, and Schlictmann grows more and more disconnected from his clients. Eventually he stops returning their phone calls. In the end Anne Anderson and some of the other plaintiffs have a dispute with Schlictmann over his fees and expenses. After the book was published, there was more acrimony. Harr sold the movie rights to *A Civil Action* to Robert Redford and Disney/Touchstone; the plaintiffs sold the rights to their story to another producer. The ensuing confrontation erupted briefly in the Massachusetts legislature, which considered a bill to prevent the use of real people's likenesses without their permission in films made in the Commonwealth.

Touchstone surmounted this difficulty and completed filming early in 1998, and the movie version of *A Civil Action* is expected to be out before the year's end. Schlictmann will be played by John Travolta—a somewhat ironic choice, given that one of Schlictmann's few acknowledged shortcomings in the book is that he doesn't dance well. But the book seems destined for the big screen, given its riveting quality and its cinematic style—each section focusing on a character and a particular scene in a way that moves the plot incessantly forward.

A Civil Action takes a prominent place in the genre that has come to be known as "faction": factual accounts that read like novels but describe historical events. To Harr's credit, his book portrays a plaintiff's lawyer and a major toxic tort lawsuit in a credibly realistic way. The long hours of document review, witness preparation, investigations, and theorizing about the case culminate in occasional courtroom highs and periodic moments of despair.

Harr is unable to escape one limitation of the genre, however. In rendering *A Civil Action* so compelling a story and in portraying the characters to maximize their interest, he ends up explaining the events in Woburn and in the courtroom mostly from the protagonist's—Schlictmann's—point of view. The book falls short when read from some other important points of view in the litigation: the plaintiffs themselves, the defense counsel, the defendants, the judges, or interested observers of the events in Woburn. Hollywood probably will further this myopia.

Short of the author treating each character's viewpoint separately, somewhat as in *The Canterbury Tales*, I cannot imagine telling the story of a lawsuit compellingly without limiting the point of view. This limited point of view is a problem, though, because "faction" purports to tell *the* story of things that *really happened*. For millions of readers and moviegoers, *A Civil Action* will define what occurred in the Woburn case. At best, however, *A Civil Action* tells the story of what happened through the eyes of a plaintiff's lawyer. To his credit, Harr includes passages that attempt to show the world from other characters' points of view. But these short accounts give way before the sheer volume and power of Schlictmann's presence. Despite this limitation, the book manages to treat its topic skillfully, interestingly, and in a way that raises important questions about environmental regulation and the courts.

Safety of the Water

One question that *A Civil Action* raises for readers is How safe is the water? The Woburn residents first noticed a problem with their drinking water in November 1964, when a new well (Well G) came on line. Three years later, Well H, 300 feet from Well G, was added to the system. The residents of east Woburn, who got most of the water from Wells G and H, began complaining about the water's taste, odor, and rust-colored appearance. The state health department threatened a shutdown of the wells because of poor bacterial quality. But the city engineer and the city's consultants declared the water "absolutely safe" and touted the plentiful supply into which they had tapped. Throughout the 1970s, local pressure forced periodic closing of the two wells, but the city turned back to them whenever there was a need for more water. Harr presents the city engineers as

David James © Touchstone Pictures. All rights reserved.

John Travolta stars as a personal injury attorney in Touchstone Pictures'/Paramount Pictures' *A Civil Action*. This new release is based on Jonathan Harr's "factional" account of a Massachusetts lawsuit over deaths from leukemia, allegedly caused by dumping of toxic waste.

completely nonresponsive to the complaints. "'We do all the tests that are necessary,' the city engineer would tell [the father of one child who dies from leukemia]. 'It's perfectly potable.'"[5]

In spring 1979 the Woburn police were called in to investigate midnight dumping of barrels in northeast Woburn. The dumper was never caught, but an astute state environmental inspector called for tests of the water in Wells G and H. They revealed contamination by a common industrial solvent: 267 parts per billion of trichloroethylene (TCE) in Well G, 183 parts per billion in Well H. Four other contaminants, including tetrachloroethylene (commonly known as "perc" and widely used in the dry cleaning industry) also showed up.

The United States Environmental Protection Agency (EPA) classifies TCE and perc as "probable" carcinogens. Although this classification is far from enough evidence to prove that the water caused the deaths of Woburn children from leukemia, it certainly casts the town and its engineers in a harsh light. Far from protecting the citizens, they were ignorant of the quality of their water and insistent that no further testing was needed. They were wrong. Children died, perhaps as a result of an engineer's defensiveness and a town's nonresponsiveness.

Today North Carolina and the federal government require water suppliers to test for chlorinated organic compounds, including TCE and perc, at least annually—more frequently if the systems are new or if the compounds are detected in any samples.[6] TCE can be detected in drinking water at 0.5 parts per billion. Currently, for regulatory purposes, the water is considered contaminated at 5 parts per billion, ten times the detection level.[7] Although both compounds are widely present in North Carolina groundwater in very low concentrations, they have not been much of a problem in drinking-water supplies. According to the North Carolina Department of Environment and Natural Resources, of the approximately 3,100 water systems regulated in North Carolina, only three have had enforceable violations for TCE in the last three years. Of those, two now are shut down, and the third has installed special treatment technology.[8] Thus the state's regulatory process has responded to cases like Woburn's by requiring testing and correction for solvent contamination in drinking water. Still, it is troubling that chlorinated solvents occur in groundwater across much of the state, even at very low levels. They almost always are the result of past spills or dumping of solvents. Whether chlorinated solvents degrade over time into more innocuous compounds is not clear. They also are notoriously difficult to assess in the groundwater and to clean up.

Detection of Cancer Clusters

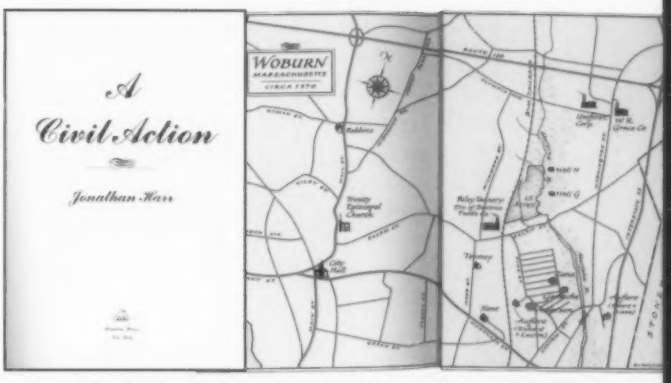
Another question that the book raises is How well equipped are the state and the nation to detect and respond to cancer clusters? Cancer is a group of about 100 different diseases characterized by uncontrolled growth and spread of abnormal cells. Four of every ten North Carolinians will have some type of cancer in their lifetime. This year more than 15,000 North Carolinians will die of cancer, or around forty-three per day. In the nation and in North Carolina, one of every four deaths is from some kind of cancer.[9] So cancer as a whole is a common disease. The causes of the different cancers are not well understood and may be complex. Cancers often have a long latency period before expressing themselves. All these factors lead to understandable public concern, especially when someone becomes aware that several people in a neighborhood are suffering from the same form of cancer.

A "cancer cluster" is an abnormally high incidence of a given type of cancer among people who live or work in the same area. Over the last twenty years, the federal Centers for Disease Control and Prevention have studied thousands of apparent cancer clusters but found very few that they believe to be genuine. Using statistical techniques to determine whether an actual cancer cluster exists is not always easy. For one thing, few Americans stay in a given location or job long enough to isolate exposures that they may have in common.

Childhood leukemia, the problem in Woburn, is a rare form of cancer. In North Carolina from 1991 to 1995, there were 3.7 cases and 1.1 deaths annually from childhood leukemia for every 100,000 children.[10] Despite the

rarity of leukemia, cancer is the chief cause of death by disease in children under age fifteen. Mortality rates have declined 62 percent since 1960, however.[11] Woburn had the relative luxury of a massive study by the Harvard School of Public Health to assess whether its cluster was real or a statistical fluke. Still, there was—and is—debate in the public health field on the ability of statistical techniques to pick out instances of excess cancers. The initial problem in Woburn was to figure out how many actual cases of childhood leukemia there had been within the area of interest to the plaintiffs. Beyond this data-gathering problem, there was the inherent difficulty of drawing lines for comparison purposes: Was the population of interest all the residents of Woburn in a given time period? Just those in east Woburn? Just those on a few streets where several of the plaintiffs lived? There is a methodological trap called the "bull's-eye effect," which is explained in the book. It comes from drawing the "targets" after the "shots" have been fired. This always makes it look like the shots hit the bull's-eye. Similarly, by drawing a ring around a small group of houses whose occupants one expects to have experienced excess cancers, one may exclude houses whose occupants also have been exposed to the water and should be included for a proper comparison. Harr does an admirable job explaining difficult problems such as this clearly and succinctly.

In North Carolina today, there is a systematic approach to the monitoring and the analysis of cancer incidence and mortality. The North Carolina Central Cancer Registry monitors cancers and also investigates reports of clusters. The registry receives about fifty cluster reports a year. It follows up each report with a standard investigation protocol, beginning with information and education materials for the person making the report, followed by statistical analysis if the person still believes a problem to exist after reviewing the registry's information. Some high-profile examples of recent investigations in North Carolina include the Paw Creek community in Mecklenburg County, the residents in the vicinity of the PCB (polychlorinated biphenyl) landfill in Warren County, and the neighborhood around the Trinity Foam plant in Guilford County.



Harr's riveting book chronicles the effects of industrial pollution on the residents of Woburn, Massachusetts, whose homes are detailed in the endleaf maps of the affected sites.

In the past three years, no reports in North Carolina have appeared to the Central Cancer Registry to be genuine clusters.[12] Of the thousands of alleged clusters that the federal Centers for Disease Control and Prevention have investigated nationally over the past twenty-five years, only a handful have proven genuine in the eyes of the researchers. These have been unusual cases with singular features such as very rare cancers and well-defined exposure patterns. Examples include a cluster of brain cancer cases among workers on the Gulf Coast, apparently related to a petrochemical processor that did give adequate protection to its workers; and a cluster of uterine and cervical cancer cases in San Francisco among women who had received high doses of hormones.[13]

Environmental Toxic Tort Cases in the American Legal System

"Environmental toxic tort" cases are cases involving allegations of injury from exposure to toxins in the environment. *A Civil Action* clearly lays out for readers the problems that plaintiffs in such cases face in proving that their injuries were caused by the defendants. The causation requirements of tort law make sense in the traditional tort context, in which an injury occurs and is obvious within a short time after its cause. With cancers like leukemia, however, many years may elapse between exposure and illness. Further, scientists and physicians do not understand what actually causes many cancers, childhood leukemia among them. How, then, can plaintiffs prove that their child's leukemia was caused by the defendants?

For the families in Woburn, this exercise took many years, numerous experts, and millions of dollars. In the end there was no proof. An exhaustive statistical study of more than 7,000 Woburn residents by the Harvard School of Public Health concluded that the data "strongly suggests the water from [Woburn] Wells G and H is linked to a variety of adverse health effects."[14] But in a courtroom, "strongly suggests" and "linked" do not necessarily amount to "actually caused."

To bolster his case, Schlictmann hired a California immunologist; a

pathologist to perform an expensive series of studies on the plaintiffs; a full-time assistant to find and record every medical visit and complaint of each of the thirty-three family members who filed suit; a Chicago physician specializing in occupational and environmental medicine to do physical exams of every plaintiff; a cardiologist to do follow-up cardiac work; a biochemist; and a toxicologist. Ultimately, Schlictmann spent more than $2 million preparing the case. One of the defendants spent more than $7 million defending the lawsuit.

Ironically, Schlictmann never had the opportunity to present the evidence on causation. To make the case more manageable, the judge ordered it to be "trifurcated"—divided into three phases. This case management approach prevented the plaintiffs from presenting their most gripping evidence first: the stories of the families and their children's deaths. Instead, phase one—the only phase completed because complicated circumstances forced the plaintiffs to settle—focused on whether the defendants' actions actually caused the drinking water to be contaminated. And the jury's instructions on this phase, after months of trial, proved so confusing that the jury had to guess how to answer several of the questions. At many junctures in the trial, despite all the years of preparation and the millions of dollars spent by all sides, the fateful moments seemed to turn more on the judge's trust in and respect for Facher, the senior defense lawyer, than on anything else.

As noted earlier, Harr's book focuses on Schlictmann and his view of the case, an understandable focus given that Schlictmann provided Harr with open access to his files, his office, and his meetings for the nine-year duration of the litigation. In the end, when Schlictmann falls millions of dollars short of the goals he has for the lawsuit, Harr leaves the impression that Judge Skinner's rulings caused this mock-tragic outcome. This question of "blame" for the outcome is one area in which Harr's "factional" account is subject to criticism. One strongly suspects that if told from any perspective in the Woburn case besides Schlictmann's, the primary cause for the unsatisfactory outcome would be much more complex. Some of the fault surely belongs with Schlictmann himself, for major errors he now freely acknowledges in his handling of the case. And some of the reason is not so much "fault" as an accurate, if disturbing, rendition of the inadequate way in which the American system of civil litigation works with complex cases involving long-latency diseases.

This aspect of *A Civil Action* is no different today in North Carolina than it was in the 1980s in Massachusetts. Complex environmental litigation is inherently difficult for the legal system to sort out. There are many reasons for this. The plaintiffs tend to be numerous and indeterminate, whereas the legal system works best with a single plaintiff or a few plaintiffs who were definitely injured. The defendants also tend to be numerous and indeterminate. Again, the system prefers a clear demarcation of potential responsibility for a given injury. The injuries themselves can occur long after the cause, and there rarely is a consensus on the cause. The cases involve battles of experts, who often push (and cross) the frontiers of accepted science. Judges and juries typically are not prepared to pick through all this uncertainty to do justice. In the past several decades, there have been many calls for reform of the legal system to accommodate such cases better, but no clear path to reform has emerged. The legal system continues to try innovation and experimentation case by case. This is little comfort for the involved parties.

Summary

Harr deserves the credit he has gotten for *A Civil Action* and the revenue he has received from sale of the book and the movie rights. The book is fascinating. Any author who can work such magic on a complex lawsuit must have mastered the writer's craft. The years of hard work, fact-gathering, and slogging through voluminous transcripts have paid off handsomely for Harr.

The book fails, however, to overcome a problem deeply engrained in the genre. It presents itself as a factual account, when it is actually dominated by a particular, nonobjective point of view and a need to tell a tale in an engaging manner. A reader who is familiar with the other characters or the general situation in which the other characters find themselves may be able to fill in the other points of view in key scenes. Most readers, however, are not equipped to do this, and the book itself does not suggest that doing so is necessary. This is always a danger with "faction."

The book serves to raise awareness, and no doubt concern, about the regulation of drinking water, the presence of contamination in the groundwater, and the ability of the legal system to cope with complex environmental cases. These legal and policy issues are still present today, although the regulatory system has been tightened in response to cases like Woburn's. For the many people who feel that the burden of additional regulation on drinking-water supplies or hazardous waste disposal is excessive, the book may cause some rethinking. It shows how bad the situation can be when water providers claim that their product is safe, even though it has not been adequately tested. The book strongly suggests that the common disposal practices of two Fortune 500 companies actually led to the horrible deaths of several innocent young children. For those who

believe that environmental problems are causing long-latency diseases like cancer for which the basic science is still unclear, the book shows how difficult redress in federal court will be. For everyone who has not read it, the book is a good introduction to these topics and a pleasure to read.

Notes

1. Jonathan Harr, *A Civil Action* (New York: Vintage Books, 1995), 86.
2. Harr, *A Civil Action*, 88.
3. Harr, *A Civil Action*, 106.
4. Harr, *A Civil Action*, 106.
5. Harr, *A Civil Action*, 23.
6. *See* 15A N.C. ADMIN. CODE 18C.1515 (incorporating by reference 40 C.F.R. § 141.24).
7. See 15A N.C. ADMIN. CODE 18C.1518 (incorporating by reference 40 C.F.R. § 141.61). Interestingly the groundwater standard in North Carolina is 2.8 parts per billion, lower than the drinking-water standard. See 15A N.C. ADMIN. CODE 2L.0202(g)(84).
8. Personal communication with Mr. Hornlean Chen, N.C. Division of Environmental Health, Public Water Supply Section, March 31, 1998.
9. N.C. Department of Health and Human Services, State Center for Health Statistics, *Cancer Facts and Figures* (Raleigh, N.C.: NCDHHS, 1997), 2.
10. Figures compiled for the author by the N.C. Central Cancer Registry, March 1998.
11. American Cancer Society, *Cancer Facts & Figures 1997*, available at http://www.cancer.org/statistics/97cff/97childr.html.
12. Personal communication with Dr. Rebecca Martin, N.C. Central Cancer Registry. The telephone number to call for investigating apparent cancer clusters is (919) 715-4556.
13. Personal communications with Drs. Stan Music and Rebecca Martin, N.C. Department of Health and Human Services, March 28, 1998.
14. Harr, *A Civil Action*, 133; published as S. Lagakos et al. , "An Analysis of Contaminated Well Water and Health Effects in Woburn, Massachusetts," *Journal of the American Statistical Association* 81 (1986): 585. ■

A SIDS Mystery

The Death of Innocents, by Richard Firstman and Jamie Talan. Bantam Books, 1997. 632 pages. $24.95 hardback.

Jill D. Moore

In 1996 North Carolina lost 101 children to the medical mystery known as SIDS—sudden infant death syndrome.[1] *SIDS touches local governments in many ways. Emergency responders and hospital personnel must listen and respond helpfully as a traumatized parent recounts the horror of discovering an unresponsive infant. Medical examiners must confirm the SIDS diagnosis. Child fatality prevention teams may review the death. In rare instances, following investigation, police may recategorize a case initially believed to be SIDS as a homicide.* The Death of Innocents *tells the story of a series of homicides misdiagnosed as SIDS in the early days of SIDS research and investigation. I strongly recommend the book. However, I hope readers will bear in mind that SIDS is a genuine medical phenomenon and that the instances in which SIDS provides an alibi for a homicidal parent are thankfully rare.*

In the fall of 1964, a young couple in upstate New York brought home their first-born son. Three months later they buried him. Eric Allen Hoyt thus became the first of Waneta and Tim Hoyt's children to live briefly and die suddenly. Over the next seven years, the Hoyts lost four more children. Julie, the third-born, died at forty-eight days of age. Jimmy, an apparently robust two-year-old, died only three weeks later.

In the spring of 1970, Waneta Hoyt called the rescue squad and reported that four-week-old Molly, her fourth-born, was blue and not breathing. Molly was revived en route to the emergency room. She was admitted to the hospital and subjected to a battery of tests, which revealed nothing. Her puzzled pediatrician referred the Hoyts to Alfred Steinschneider, a physician at New York's Upstate Medical Center in Syracuse who studied infants' breathing patterns. That single referral had a profound influence on the next two decades of SIDS research and practice, culminating in an astonishing criminal investigation that placed Waneta Hoyt—and, in effect, Steinschneider's "apnea" theory of SIDS—on trial. In his studies Steinschneider had observed that normal infants experience apnea, or pauses in their breathing. Perhaps, he reasoned, some unlucky infants never emerged from their apnea episodes but simply died. He had noted that some infants had more prolonged or more frequent periods of apnea than others, and he theorized that these infants might be at high risk for SIDS. He hypothesized that infants with prolonged apnea suffered from some unknown defect, possibly familial in origin. If so, perhaps such infants could be identified in advance, monitored at home, and revived if they stopped breathing for too long.

Molly Hoyt spent most of her brief life in the hospital being studied by Steinschneider. She died at eleven weeks of age, less than twenty-four hours after being discharged to her home.

Just one year later, the Hoyts' fifth and last biological child,[2] Noah, was admitted to the hospital and placed under Steinschneider's surveillance immediately on birth. Noah left the hospital twice, only to be readmitted quickly after he reportedly stopped breathing at home. Noah was discharged from the hospital a final time

in July 1971. He died less than twelve hours later. He was eighty days old.

In 1972 the prestigious medical journal *Pediatrics* published a paper by Steinschneider that reported his clinical observations of the last two Hoyt children (whom he identified only as M.H. and N.H.) and described his apnea theory. The response was extraordinary. The medical community and an emerging social movement of parents who had lost children to SIDS embraced the theory with enthusiasm. Researchers pursuing the apnea idea—including Steinschneider—sought and received huge amounts of federal funding. An entire industry emerged as devices for monitoring infants' breathing patterns in their homes were developed and sold to thousands of parents of children believed to be at risk.

There was only one problem, according to the authors of *The Death of Innocents*. Steinschneider's theory was seriously flawed, if not plainly wrong. The authors contend that the research on which it was based was methodologically suspect and that much of the data supporting the theory was fabricated. Worse, Firstman and Talan argue, Steinschneider's paper had provided an alibi for a serial killer. In the spring of 1994, nearly twenty-three years after her last biological child's death, Waneta Hoyt confessed to police that she had suffocated each of the five children. She was subsequently convicted on five counts of second-degree murder.

The unfortunate results of the meeting of Waneta Hoyt's oddly damaged psyche and Alfred Steinschneider's undisciplined ambition constitute the central tale of *The Death of Innocents*. The authors recognized, however, that the story of how this "collaboration" came under scrutiny two decades after it occurred is equally riveting. The book therefore opens with the case of Stephen Van Der Sluys, a Syracuse resident who suffocated his first three children and almost got away with it. In the course of prosecuting Van Der Sluys, a district attorney happened across Steinschneider's twenty-year-old paper and became convinced that the cases it described were homicides. His pursuit of the woman who was identified in the paper only as Mrs. H. is a fascinating, against-all-odds detective story.

The book is much more than a true-crime story, however. It also is a scathing indictment of Steinschneider and the medical research establishment that allowed shoddy research to go unquestioned. Steinschneider is portrayed as a ruthlessly ambitious scientist who sacrificed his integrity to his theory, falsifying data and ignoring the pleas of experienced nurses to consider the possibility that Waneta Hoyt was killing her children. The authors accuse the medical world at large not only of accepting Steinschneider's theory too quickly and without adequate scrutiny but also of wearing blinders: according to Firstman and Talan, many doctors simply refused to believe that a mother was capable of killing her own children.

The authors pointedly note the influence of business interests on the rapid spread and acceptance of the apnea theory, emphasizing that individuals and medical research institutions profited from the development of the home-monitoring industry. Poignant examples describe the stress-filled existences of parents who ordered their entire lives around the home monitoring of their children. The authors fault physicians for continuing to promote home monitoring when research failed to demonstrate the validity of the apnea theory or the effectiveness of home monitoring.

On a more subtle level, the book also is critical of the political and social environment of the 1970s and 1980s. The authors charge the "SIDS movement"—a loosely defined term apparently referring to the political, fund-raising, and support groups composed primarily of bereaved parents—with creating an environment in which it was unacceptable to view the grieving parents of a dead baby with suspicion.

When it was first released in October 1997, Firstman and Talan's book touched off two fiery controversies. First, the book harshly criticizes the infant-monitoring program at Massachusetts General Hospital, which has operated for two decades on the apnea theory of SIDS. The authors accuse physicians at that revered hospital of providing an outlet and an alibi for psychologically disturbed parents who deliberately induce medical problems in their children because they thrive on the attention of physicians and hospital staff. In the fall of 1997, Boston newspapers made much of this aspect of the book, filling several columns' worth of copy with exchanges between the authors and Massachusetts General spokespersons.

The other controversy related to the book's focus on the sensational but rare cases in which faulty diagnoses of SIDS covered up multiple infanticides in a single family. The authors acknowledge at several places in the book that SIDS is a legitimate, if ill-understood, medical phenomenon and that the proportion of infant deaths attributed to SIDS that were actually infanticides is probably quite small. But the media flurry that accompanied the book's release probably obscured those points and may have contributed to some SIDS parents' believing that the book devalued their loss and subjected their motives to renewed scrutiny.[3]

These controversies demonstrate that *The Death of Innocents* is a very powerful book indeed. Moreover, it is a sensational read. Firstman and Talan's thorough documentation of

three decades of SIDS theories and research becomes a bit tedious, but it is essential to their argument that Steinschneider's work ultimately served as an unfortunate and prolonged distraction from the goal of understanding and preventing SIDS. In the book's conclusion, the authors briefly describe how the "Back to Sleep" health education campaign, which encourages parents to put newborns to sleep on their backs rather than their stomachs, has caused the SIDS rate to fall significantly for the first time since the phenomenon was named and studied. The authors express regret that the back-to-sleep idea did not gain prominence when it was first suggested in the 1960s. They attribute this failure to the "clamor over the apnea theory."

When I completed the book, I felt dissatisfied on only two counts. The first is minor. I had hoped to understand Waneta Hoyt better. What could have led her repeatedly to give birth to children whom she would not permit to live? The authors speculate some but do not fully explain this behavior, probably because they cannot. All their investigative reporting failed to turn up the innermost workings of Waneta Hoyt's mind.

The second count of dissatisfaction is serious but cannot be attributed to these authors. All the investigative reporting in the world has not shed light on the central tragedy of *The Death of Innocents*—the *still* unsolved medical mystery known as SIDS.

Notes

1. Wade Rawlins, "Child-Abuse Deaths Climb in '96," *News & Observer* (Raleigh, N.C.), April 28, 1998.

2. After the deaths of their five biological children, the Hoyts adopted a child, who survived to adulthood.

3. Readers who are particularly interested in this issue should visit the Web site of the National SIDS Alliance. Correspondence between the alliance's leadership and the authors of *The Death of Innocents* is published at http://sids-network.org/abusesainfo.htm.

At the Institute

Institute Celebrates Groundbreaking

On June 15, 1998, more than seventy-five friends and supporters helped the Institute of Government kick off renovation and expansion of the Joseph Palmer Knapp Building, expected to be completed in late 2000.

Institute Director Michael R. Smith marked the occasion as "an opportunity to count our blessings and to say thanks" to all who have supported the Institute's work since its beginning in 1931.

Guest speakers were James E. Holshouser, former North Carolina governor and current IOG Foundation board member, and Elson S. Floyd, executive vice-chancellor of The University of North Carolina at Chapel Hill.

The North Carolina General Assembly has contributed more than half of a total of $16.1 million for the project. The remainder of the funding is expected this year. *—Jennifer Litzen*

Former governor and current IOG Foundation board member James E. Holshouser remarked, "The Institute has truly made a difference in the landscape of the state. Our local governments are the envy of the country."

Superior Court Judge Thomas W. Ross gets a "tour" of the construction site from Tonya Stoddard, an Institute program coordinator.

Thomas H. Thornburg, the Institute's associate director for programs, discusses construction plans with North Carolina Representative Wayne Goodwin (right).

All photographs by Jim Webb

Berner Joins IOG

Maureen Berner joined the Institute of Government on July 1 as an instructor in public administration and government. She is the first faculty member hired specifically for the Master of Public Administration (MPA) Program since its administrative relocation to the Institute.

"Maureen had offers from other top-tier public administration programs, but we were able to attract her to Chapel Hill," said Stephen Allred, director of the program. "She brings an outstanding academic background and years of government experience. She'll teach not only public administration theory but what really works."

Berner will teach two courses in the MPA Program this year: in the fall, policy evaluation methods, including statistics and quantitative tools for public administration; and in the spring, program evaluation, from formation of questions to presentation of results.

"I really enjoy students," Berner said. "I want them to be enthusiastic about a career in the public sector."

Jim Webb

Maureen Berner

Berner is studying changes in federal budget policy and process and will work with faculty member A. John Vogt to understand the effect of federal budget trends on state and local government in North Carolina. She is focusing on performance budgeting, a technique that ties dollar amounts to strategies intended to maintain or improve government services.

Just before joining the Institute, Berner helped facilitate An Exercise in Hard Choices, a public workshop on federal budget implications, held in Greensboro and sponsored by the Committee for a Responsible Federal Budget (a bipartisan nonprofit organization) and American Express Financial Advisors. The workshop included U.S. House of Representatives members Cass Ballenger, Richard Burr, Howard Coble, Bob Etheridge, and Mel Watt, representing various districts of North Carolina.

Berner also has worked with state and local government officials at the Public Service Academy of Southwest Texas State University, teaching state and federal budget policy and the use of government data sources on the Internet.

After receiving a bachelor's degree from the University of Iowa and a master's degree in public policy from Georgetown University, Berner spent five years at the U.S. General Accounting Office, where she performed evaluations of budgetary processes and policies. Currently she is finishing doctoral work in public policy at the Lyndon B. Johnson School of Public Affairs, the University of Texas at Austin. —*Jennifer Litzen*

Institute Faculty Receive Awards

Three Institute of Government faculty members received awards on July 1 for excellence in teaching, research, and writing. The awards were created this year from earnings on private endowments.

Joan G. Brannon received the Charles Edwin Hinsdale Professorship; Robert P. Joyce, the Albert and Gladys Hall Coates Term Professorship for Teaching Excellence; and Frayda S. Bluestein, the Albert and Gladys Hall Coates Term Professorship for Outstanding Junior Faculty Achievement.

The Hinsdale professorship, which is a lifetime honor for the holder, was established in 1993 with a gift from the estate of Charles Edwin Hinsdale, a twenty-year faculty member in the field of courts law. Brannon joined the Institute in 1971 and worked closely with Hinsdale until his retirement in 1981. Her expertise includes court structure and procedure; legal responsibilities of clerks of court, magistrates, and sheriffs; and landlord-tenant law.

Jim Webb

Robert P. Joyce, Frayda S. Bluestein, and Joan G. Brannon

"Ed Hinsdale would be very pleased if he knew that Joan was the initial

holder of the professorship created in his name," said faculty member James C. Drennan. "As colleagues, they shared a passion for improving our justice system by helping those who work in it."

The awards received by Joyce and Bluestein, which run for two years, are named after the Institute's founders. These awards were established from a gift by the late Paul and Margaret Johnston of Chapel Hill.

Joyce came to the Institute in 1980 and has concentrated his work in the law of schools and higher education, elections, governmental employer-employee relations, and employment discrimination.

"Bob respects the knowledge and experience our clients bring to class, meets them at their level, and takes them farther along in understanding the legal constraints on their work," noted faculty member Laurie L. Mesibov.

Bluestein, who became a faculty member in 1991, specializes in local government purchasing and contracting, conflicts of interest related to government contracts, municipal incorporation, and the process of privatizing government services.

"Frayda joined the faculty upon the retirement of Jake Wicker and assumed responsibility for the field of purchasing and contracting, which had long been closely identified with Jake," said faculty member David M. Lawrence. "She has made the field thoroughly her own and contributed significantly to it."

—Jennifer Litzen

(From right) Interns Piper Nieters of UNC–Asheville and Shannon Walls of Belmont Abbey College meet with Ann Berlam, legislative director for the Department of Public instruction, and Dee Atkinson, assistant to Berlam. Nieters worked closely with Berlam to produce an annual report of education legislation and other reports for the department. Walls assisted Jane Worsham, executive director of the State Board of Education, by rewriting an educational pamphlet and creating a database of educational topics.

Both photos by Jim Webb

Intern Amy Hodge of UNC–Wilmington (left) helped redesign a crime prevention program with Richard Martin, Jr. (right), specialist in youth and community development for the Department of Crime Control and Public Safety. Intern Narali Patel of UNC–CH (center) worked nearby in the Governor's Office on such projects as tracking education legislation for Karen Garr, teacher adviser to the governor.

More Than Thirty Years of Institute Internships in State Government

Near the end of his governorship, Terry Sanford wanted to ensure the survival of a state government intern program for college students that he had begun in 1962. The Institute agreed to take over its administration in 1965, and the program continues today. This summer the Institute placed twenty-one interns in various government offices, primarily in Raleigh.

From May 20 until July 31 of this year, interns contributed substantially to their offices by writing articles, brochures, reports, and replies to letters from constituents; designing new programs; tracking legislation; and suggesting and creating more efficient ways to keep track of information. Interns' work environments ranged from the Department of Crime Control and Public Safety to the Discovery Room at the Museum of Natural History.

"The interns are very well educated people who can perform the same duties as staff researchers," said intern supervisor Zee B. Lamb, legal counsel to Lieutenant Governor Dennis Wicker. Lamb and the other supervisors ensured that each intern also learned about various government processes by touring other departments and observing the progress of legislation.

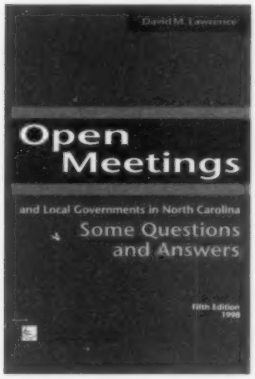
"Government needs a wide variety of talents," noted Cheryl Daniels Howell, faculty director of the program. "Therefore the Institute program attracts students from many fields of study, ranging from political science to medicine. The interns benefit from the knowledge of how government actually works on a daily basis. They may go on to serve in the public sector, but whatever career they choose, they will be better-informed citizens as a result of their intern experience."

The interns live together on the Meredith College campus during the ten-week summer program. They learn subtle lessons from living as a group, such as finding common ground with colleagues from different educational, geographical, and cultural backgrounds.

"The biggest challenge is to keep the group on track," said Lisa Podhajsky, who has coordinated the program since 1993. "We're providing good opportunities, and we want the summer to be a positive experience for everyone."

—Jennifer Litzen

Off the Press



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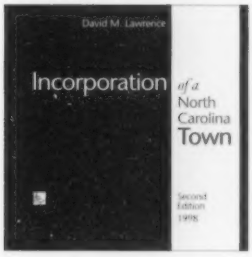

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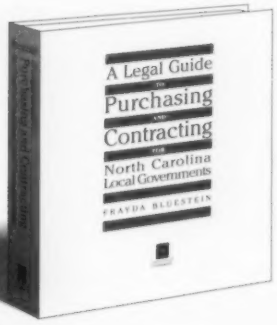

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POPULAR GOVERNMENT
(ISSN 0032-4515)
Institute of Government
CB# 3330 Knapp Building
The University of North Carolina at Chapel Hill
Chapel Hill, NC 27599-3330

. . . and at the same time
to preserve the form and spirit of
popular government . . .

—James Madison
The Federalist, No. 10